



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

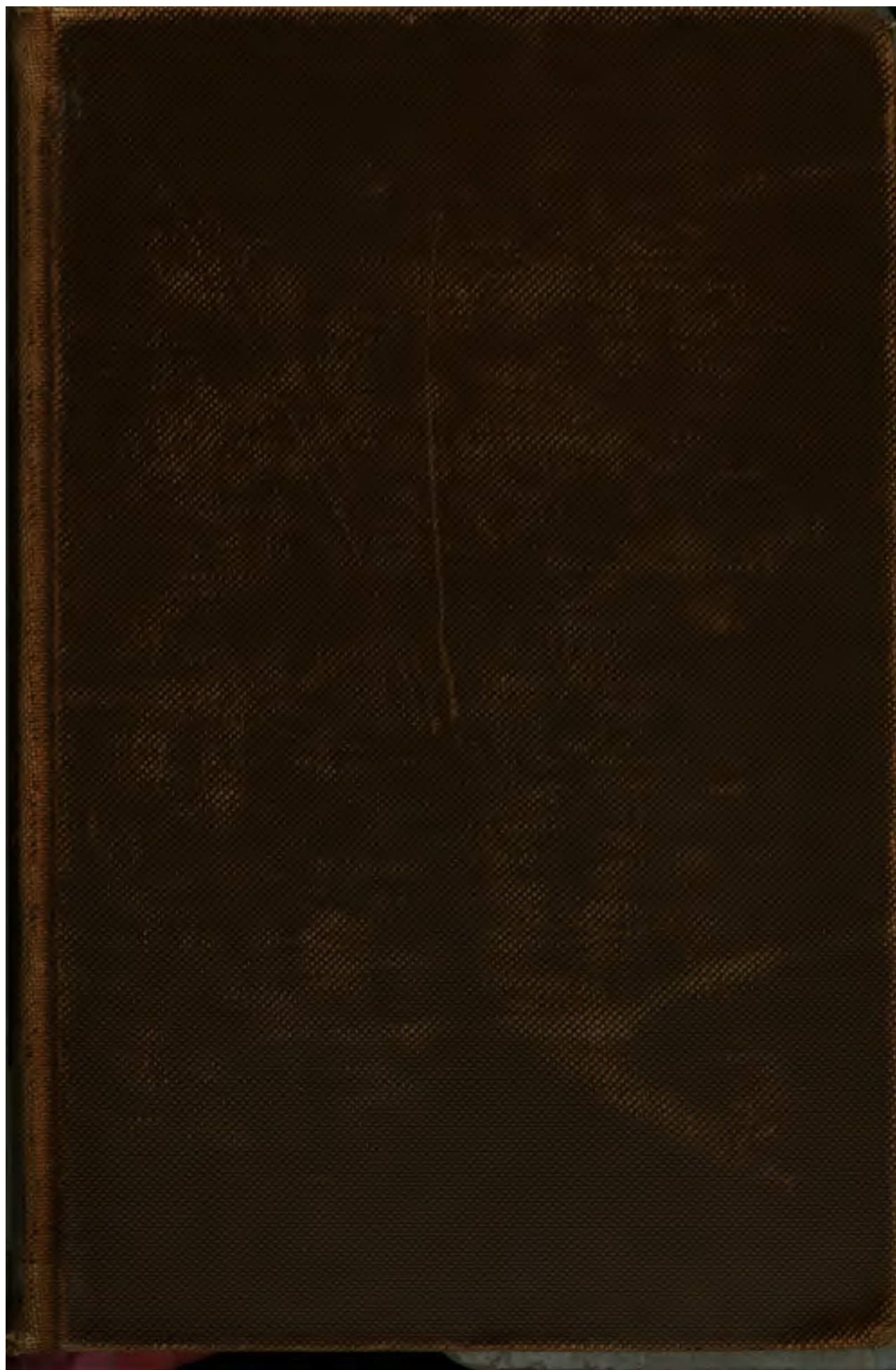
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



MORTGAGES

Assignment of Cases

Introduction: 11 (Elkston quot.), 19 (Kent quo.).
Equitable Mortgages: 24, 25, 110, 111, ^{Uy max, 409.} ~~Syl. 1-3~~, 114, 116, 121, 131, 135.
Conditional Sales as Mortgages: 151, 164, 167.
Absolute Deeds as Mortgages: 177, 191, 183.
The Debt: 208, 211, 265, 274, 280, ~~Syl. 4-8~~ *Dunfee*, 112.
Illegal Mortgages: 223, 234, 253, 241, 244, 248, 256.
Legal Title: 286, 289, 292, 287 (2d), 299, 295, 298, 304, 308.
Possession: 313, 314, 316, 332, 322, 325, 331, 334, 340.
Waste: 410, 414, 427, 412, 416, 421.
Barring Redemption: 436, 471.

Releasing Equity of Redemption: 445, 448, 453, 460.

Collateral advantages: 473, 488, 490, 496.

Other Obligations: 500 (2d), 503, 504, ~~Syl. 505~~ *Uryman*, 385.

Marshaling: ~~Syl. 10-22~~ *Uryman*: 436, 438, 437, 440, 450, 477.

Priorities: ~~Syl. 23-27~~ *Uryman*: 453, 456, 465, 462, 429.

Mortgages in Possession: 506 (both), 507, 522, 511, 514, 524, 536,
543 (2d), 546, 548, 550, 559, 561, 562, 563 (both), 564,
569, 570 (2d), 574, 585, 590.

Extension of Mortgage: 605, 606, 618, ~~Syl. 33-43~~ *Uryman*: 462, 399, 422.

Transfer of Mortgage: 634, 623, 630, 643, 656, 667, 675, 681
(omit from bottom of 682 to middle of 686.).

Discharge of Mortgage: 695 (Litt. quotations), 697 (both), 698
(1st), 706, 702, 709, 713 (omit Comstock's opinion),
736, 740, 753, 769, 758, 763, 750, 741, 748, 742.

223-833

18

AD-1
V.1
12



Whittier

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF MORTGAGE

BY

GEORGE W. KIRCHWEY

NASH PROFESSOR OF LAW IN COLUMBIA UNIVERSITY

PART I

NEW YORK

BAKER, VOORHIS & COMPANY

1900

Table of Contents of Part I.

Book I.

Introduction - Property Security for Deb.

(a) Pledge & Hypothecation	1.
(b) Early Statutory Securities	7.
(c) The Com. Law Mortgage	9.
(d) The Equitable Mortgage	24.

Book II.

Essential Elements of Mortgage.

Chapter I.

Conveyance.

Sec. 1. Mortgage, Pledge & Lien	28.
" 2. After-acquired Property	40.

CORRECTION, 1900

By GEORGE W. KIRCHWEY

" 3. Informal Mortgages.	110.
--------------------------	------

Chapter II.

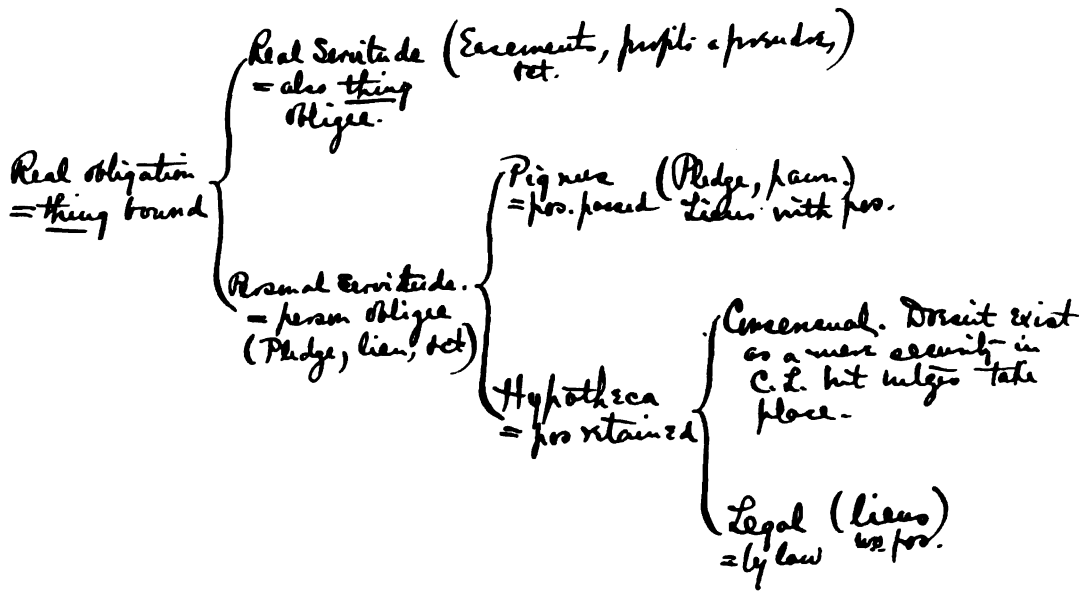
Security.

Sec. 1. Mtge + Cond. Sale	147.
" 2. Absolute Deed - Parol Ev.	175.

Chapter III.

The Obligation Secured.

Sec. 1. Is an Oblig. Necessary?	202.
" 2. Illegal Obligations.	218.
" 3. Future Advances.	265.



C. B. Whittier

SELECT CASES

AND OTHER AUTHORITIES

ON THE LAW OF MORTGAGE.

BOOK I.

INTRODUCTION: PROPERTY SECURITY FOR DEBT.

(a) *Pledge and Hypothecation.*

LANGDELL, CLASSIFICATION OF RIGHTS AND WRONGS, 13 HARV. L. R. 539, 540. An obligation is either personal or real, according as the obligor is a person or a thing. . . .

A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitudes* (*i. e.*, states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These *servitudes* were divided into real and personal *servitudes*, being called real when the obligee as well as the obligor, *i. e.*, the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed *servitudes proper*, have passed into our law under the names of *easements* and *profits à prendre*. The latter included the *pignus* and the *hypotheca*, *i. e.*, the Roman mortgage—which was called *pignus* when the thing mortgaged was delivered to the creditor, and

Real Obliga-
tion when
thing is
mortgaged.

In this it is
another thing
are mortgaged
out.

Real servitudes
when obligee is
a thing - easement
etc.

Personal servitudes
when obligee is a person
Such as mortgages,
pledges, etc.

*Pignus = pawns 2
dim transferred.*

Hypotheca = not.

PROPERTY SECURITY FOR DEBT.

[BOOK I.]

hypotheca when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner. Originally, possession by the creditor of the thing mortgaged was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such as were created by the acts of the parties (conventional hypothecations), and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

*Hypotheca
by parties
by law.*

May hypothecate all or certain prop. or after-acquired prop. only, too.

The *pignus* has passed into our law under the name of pawn, or pledge, as to things movable, but has been wholly rejected as to land. The conventional *hypotheca* has been wholly rejected by our common law, though it has passed into our admiralty law. The legal or tacit hypothecation, on the other hand, has been admitted into our common law to some extent, though under the name of lien (a word which has the same meaning and the same derivation as "obligation"). Thus, by the early statute of 13 E. I., c. 18, a judgment and a recognizance (the latter being an acknowledgment of a debt in a court of record, of which acknowledgment a record is made) are a general lien on all the land of the judgment debtor and recognizor respectively, whether then owned by them or afterwards acquired. So also, in many cases, the law gives to a creditor a similar lien on the debtor's movable property, already in the creditor's possession when the debt accrues, though, in respect to the creditor's possession, this lien has the features of a *pignus* rather than of a *hypotheca*.

means that one thing is not at all the more creation of a lien but a sale with cond. Sub. & so diff. from Roman hypotheca.

Pledge

lien

lien

Lien.

Statutory

lien on land like hypotheca.

Lien on goods like pignus.

Servian action to enforce a *pignus*. ^{discrep. permut}
Quasi-Servian " " " an *hypotheca* or pledge. ^{by law permut.}

Hypotheca: a mere formless agreement. Was
enforced by Praetor only, not by earlier law.
Permitted property in general or future
property to be pledged.

JUST., INST., Lib. IV., c. 6, § 7. Again, the Servian and quasi-Servian actions, the latter of which is also called "hypothecary," are derived wholly from the Praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of a pledge (*pignus*) as security for his rent. The quasi-Servian action is a similar remedy open to any creditor for the purpose of enforcing his pledge or *hypotheca*. So far then as this action is concerned, there is no difference between a pledge and a *hypotheca*; and, indeed, whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called by either name. In other respects, however, there is a distinction between them; for the term, pledge, is properly used only where possession of the property in question is delivered to the creditor, especially if such property be movable; whereas by the term *hypotheca*, strictly speaking, we signify a right arising by mere agreement without delivery of possession.

Servian lien

pledge = pignus

hypotheca = hypotheca

Institute of Emperor Justinian, Annotation II, p. 6.

MOYLE, IMP. JUST. INST., Excur. II., p. 6. The latest and most refined form of pledge is *hypotheca*, in which there was no conveyance of either ownership or possession; it was effected by a bare, formless agreement between the debtor and creditor, that certain specific property of the former should be liable in full for his debt to the latter, who should be entitled to sell in default of payment within a prescribed time: "*Contrahitur hypotheca per pactum conventum, cum quis paciscatur, ut res eius propter aliquam obligationem sint hypothecae nomine obligatae: nec quid rem pertinet, quibus fit verbis*" (Dig. 20, I. 4). Such an agreement, in itself, was inoperative to create rights, either real or personal; it was, however, enforced by the praetor, who treated the right of sale as a *ius in re aliena*, of which the creditor could not be deprived by any subsequent act of the debtor, and which he could successfully assert (by remedies of his own introduction) against any other person whatsoever, whether the creditor, his successor, alienee or trustee in bankruptcy.

Origin of hyp. hypotheca in praetor. enforcing the agreement.

Hypotheca possessed great advantages over the earlier forms of pledge, of which *fiducia* was quite obsolete in the time of Justinian. The pledgor was never deprived of the use and possession of his property, and yet the creditor was absolutely secured. The class of pledgable objects was largely augmented: Money could now be lent on the security of things not yet in existence, e. g., future crops and expectations ("*et quae nondum sunt, futura tamen sunt, hypothecae dari possunt, ut fructus pendentes, partus ancillae, fetus pecorum.*" Dig. 20, 1.15) or of mere incorporeal rights, real and personal (Dig. 20, 9, I.; ib. 11, 2; Dig. 13, 7, 18 pr.). Moreover

Could pledge future prop. etc. or prop. etc. generally.

it became possible to create a general mortgage, which was done by statute, in favor of many classes of persons: *e. g.*, of a wife or other person who gave a *dos* over the property of her husband, to secure its return, and of pupils over that of their guardians.

1187-9.

GLANVILLE, Lib. X., c. 6 (Beames). A Loan is sometimes made upon the Credit of a putting in Pledge. When a Loan of this description takes place, sometimes moveables, as Chattels, are put in pledge; sometimes immoveables, as Lands and Tenements, and Rents, whether consisting in Money or in other things. When a Compact is made between a Creditor and Debtor, concerning the putting anything in pledge, then, whatever be the mode of pledging, the Debtor upon his receiving the thing lent to him, either immediately delivers possession of the Pledge (*vadii seisinam*) to the Creditor, or not. Sometimes also a thing is pledged for a certain period, sometimes indefinitely. Again, sometimes a thing is pledged as a Mortgage (*in mortuo vadio*), sometimes not. A pledge is designated by the term Mortgage when the fruits and Rents, which are received in the interval, in no measure tend to reduce the demand for which the pledge has been given. When, therefore, moveables are put in pledge, so that possession be delivered to the Creditor for a certain period, he is bound to keep the pledge safely, and neither to use it, nor in any other manner employ it, so as to render it of less Value. But should it, whilst in Custody and within the Term, suffer deterioration, by the fault of the creditor, a Computation shall be made to the extent of the detriment and deducted from the Debt. But if the thing be of such a description that it necessarily requires some expense and cost, for Example, that it might be fed or repaired, then the stipulation of the parties on that subject shall be abided by. In addition—when a thing is pledged for a definite period, it is either agreed between the Creditor and Debtor, that if, at the time appointed, the Debtor should not redeem his pledge, it should then belong to the Creditor so that he might dispose of it as his own; or no such agreement is entered into between them. In the former case, the Agreement must be adhered to; in the latter, the Term being unexpired without the Debtor's discharging the Debt, the Creditor may complain of him, and the Debtor shall be compelled to appear in Court, and answer by the following Writ.

c. 7. "The King to the Sheriff, Health: Command N. that justly and without delay, he redeem such a thing which he has pledged to R. for a hundred Marks, for a Term which is past, as he says, and of which he complains that he has not redeemed it; and, unless he does so, &c."

c. 8. . . . When a Compact is entered into between a Debtor

Being pledge
no title has
passed.

Putting in pledge seems not to signify a modern mortgage, but transaction like pignus or hypotheca according to whether pos. was given cred. or not. See →

But a contract that if debt not pd when due the cred. shall have thing absolutely re-enforced. See * ^{interferes to}

King's Court ^{and not.} ^{unless I find in King's Co.} Compel debtor to turn over the pledge. ^{But if cred. has pledge} he had a mit. to make debtor redeem it & debtor had a mit. to get it back if he had pd. See +

If profits of thing, real or personal, are not to go in reduction of debt it is called a mortgage or dead pledge. See +

The cred. in pos. if ousted has no action to recover pos. If ousted by a stranger the mortgagor must bring a novel disseisin - if ousted by the mortgagor the cred. must simply sue for his debt.

and Creditor, concerning the pledging of a particular thing, if the Debtor, after having received the Loan, should not deliver the pledge, it may be asked, what step should the Creditor have recourse to in such a case, especially as the same thing may be pledged to many other Creditors, both previously and subsequently? Upon this subject, it should be remarked, that the King's Court is not in the habit of giving protection to or warranting private Agreements of this description, concerning the giving or accepting things in pledge, or others of this kind, made out of Court, or even in any other Court than that of the King. If, therefore, such Compacts are not observed, the King's Court does not interfere; and hence it is not bound to answer concerning the right of different Creditors, as prior or subsequent, or respecting their privileges.

made

perhaps
in King's
and be
forced +
ed,

+
~~Some are~~
~~the King's~~
~~Court~~
=

But, when an immoveable thing is put into pledge, and Seisin of it has been delivered to the Creditor for a definite term, it has either been agreed between the Creditor and Debtor, that the proceeds and rents shall in the mean time reduce the Debt, or that they shall in no measure be so applied. The former Agreement is just and binding; the other, unjust and dishonest, and is that called a Mortgage; but this is not prohibited by the King's Court, although it considers such a pledge as a species of Usury. Hence, if any one die having such a pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the Effects of a Usurer. In other respects, the same Rules should be observed as in pledges of moveables, concerning which we have already spoken. But it must be remarked, that if, after any one has paid his Debt, or has in a proper manner tendered it, the Creditor should maliciously detain the pledge, the Debtor upon complaining to the Court shall have the following Writ:

c. 9. "The King to the Sheriff, Health: Command N. that justly and without delay he render to R. the whole Lands, or such Lands, in such a Vill, which he has pledged to him for a Hundred Marks for a term which is past, as he says, and has received his Money, or which he has redeemed, as he says; and, unless he does so, Summon him by good, etc."

→

c. 11. If the Creditor lose his Seisin, either by means of the Debtor, or any other person, he cannot recover it through the assistance of the Court; not even by a Recognition of Novel Disseisin. For if he was unjustly and without a judgment disseised of his pledge, by any other person than the Debtor himself, the Debtor may have an Assise of Novel Disseisin. If, however, the Creditor was disseised by the Debtor himself, the Court will not assist him against the Debtor, in recovering his pledge, or in giving a Re-entry, unless through the Debtor himself; for the Cred-

#

+
Pledge
cannot
recover
if
disseised

itor should resort to an original Plea of Debt, in order that the Debtor may be compelled to render him satisfaction for his Debt. In such case the debtor shall be summoned by the foregoing Writ of first summons.

In early Eng.
pledge of
realty for money
just as in
Roman law.

CHAPLIN, STORY OF MORTGAGE LAW, 4 HARV. L. R. 6. Using the word *vadium*, gage, whether the possession was to be turned over to the pledgee or not, the Norman judges recognized gages or pledges of land, either with or without transfer of possession. If the pledgee took possession, the transaction was a pawn; if not, it was a hypothecation.

Pro. not
essential
to pledge
of land.
But need
was if no
pos given.

It would be the greatest mistake to suppose that feudal seisin was essential to an effectual pledge of land in feudal times. The pledgee might leave the pledgor in possession, and still be secure by recording a written contract of pledge in the King's Court: precisely as, under Justinian, such a contract would have been registered in a public office, or, under the Saxon laws, in a county court or a monastery. This provision for registration was a mere adaptation to English ground of the Roman system.

Pledgee
of land
in posses-
sion did
not have
Seisin.

Even when the pledgee of land, in feudal times, took possession, he did not take a full feudal seisin; he took only a "*quasi*" seisin, a seisin "*de vadio*," as it was called—a "pledgee's seisin"—a seisin distinct from a general seisin, not exclusive of that of the pledgor, but consistent with and dependent upon it—a parasitic seisin. The word "seisin," of course, was not exclusively applied to freehold estates in land, but was used of chattels and of chattel estates in land, as leaseholds. And just as a lessee of land had not a seisin of his own, but had his landlord's seisin, so in the case of a pledge, even with the possession, the freehold was deemed to remain in the pledgor, and the pledgee was said to be seised "through" the owner of the fee—to be seised not in his own name, but in the name of another. The heirs of the pledgee who died in possession were spoken of in contradistinction from the "*verus hæres*." The fact that the land so in pledge, and even in the possession of the pledgee, was still viewed as in the seisin of the pledgor, appears

Pledgor's widow
had dower.

Pledgee, c.d.
not bring
novel disseisin.

from the fact that it was subject to dower, not of the pledgee's, but of the pledgor's widow; and there could be no dower without seisin. If a pledgee in possession were ousted by a stranger, he could not maintain a writ of *novel disseisin* to recover possession; the pledgor had to bring the action, counting on his own seisin.

Had a special
writ of *mort d'ancestor*.

And where one seised as pledgee died in possession, and his heir, being excluded, brought a writ of *mort d'ancestor*, to get possession, he was provided, not with the ordinary writ of *mort d'ancestor*, counting upon seisin generally, but with a special writ, alleging in his ancestor a seisin *de vadio*.

See marginal notes.

Statute Merchant. Called such from name of statute De Mercatoribus. Entered into before chief magistrates of a trading town. Cd arrest debtor, seize goods, & also seize thold land until it pd debt. 13 Edw I. Allowed at first only to merchants.

Statute Staple. Entered into before Mayor of the Staple 150 got name. 27 Edw. III. Effect same. Allowed to same.

Recognizance in nature Statute Staple. 23 Hen. VIII. Entered into before chief justices & others. Extends benefit of above to those not merchants. Not good as bona fide purchasers until enrolled.

Eligibility. West II, 1285. Allowed $\frac{1}{2}$ of lands to be de. ^{by} ~~himself~~ ^{to any T. cred.} until debt pd. Applied only to $\frac{1}{2}$ as that was all cd be alienated before Quia Emptores. & no let-up since not merchants.

Tenant in above statutes has but chattel interests which pass to their execs, because debts if pd wd belong to execs. But they have same remedy to recover their estates if mortgaged as tenants of freehold. Estates of course are uncertain of nature 150 like freeholds.

The legal remedy for enforcing a simple gage or pledge of land in the time of Glanville, so far from having those harsh features which we are wont to attribute to our early law, followed that just and equitable system of Roman law which was the cradle of our equity. When a debt secured upon land was due, the pledgee had a writ expressly framed for foreclosure,¹ substantially identical with the Massachusetts writ of entry for foreclosure of a mortgage. The process could be enforced by the courts by a seizure of the property pledged, if it remained in the pledgor's possession, or by other distraint; and there was a conditional judgment, precisely as there is upon the Massachusetts writ of entry for foreclosure, that the debtor should still have a reasonable time to pay before the foreclosure should become absolute.

In Glanville's day was for down into equity of redemptio with cond. judgment.

~~omit~~ *omit*

(b) *Early Statutory Securities.*

2 BLACKSTONE, COM., 160. A fourth species of estates, defeasible on condition subsequent, are those held by statute merchant, and statute staple; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I., *De Mercatoribus*, and thence called a Statute Merchant; the other pursuant to the statute 27 Edw. III., c. 9, before the Mayor of the Staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of Parliament in certain trading towns, from whence this security is called a Statute Staple. They are both, I say, securities for debts acknowledged to be due; and originally permitted only among traders, for the benefit of commerce; whereby not only the body of the debtor may be imprisoned, and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor, till out of the rents and profits of them the debt may be satisfied; and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, acknowledged before either of the chief justices, or (out of term) before their substitutes, the Mayor of the Staple at Westminster and the Recorder of London; whereby the benefit of this mercantile transaction is extended to all the King's subjects in general, by virtue of the statute 23 Hen.

¹ Glanv., l. x, c. 7; page 4, *supra*.

VIII., c. 6, amended by 8 Geo. I., c. 25, which directs such recognizances to be enrolled and certified into chancery. But these, by the statute of frauds, 29 Car. II., c. 3, are only binding upon the lands in the hands of bona fide purchasers, from the day of their enrollment, which is ordered to be marked on the record.

Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an estate by *elegit*. What an *elegit* is, and why so called, will be explained in the third part of these commentaries. At present I need only mention, that it is the name of a writ, founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid; and during the time he so holds them, he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *Quia Emptores*, it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them; the statute, therefore, of Westm. II. permits only so much of them to be affected by the process of law, as a man was capable of alienating by his own deed. But by the statute *De Mercatoribus* (passed in same year) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only half of them was liable to be taken in execution for any other debt of the owner.

18 Edw. I.

I shall conclude what I had to remark of these estates, by statute merchant, statute staple and *elegit*, with the observation of Sir Edward Coke. "These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds" (which make them an exception to the general rule), "because, though they may hold an estate of inheritance, or for life, *ut liberum tenementum*, until their debt be paid; yet it shall go to their executors; for *ut* is similitudinary; and though to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have, yet it is but the similitude of a freehold, and *nullum simile est idem*." This, indeed, only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold; but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir, which is probably owing to this: That, being a security and

See marginal notes.

remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable from a principle of natural equity, that the security and remedy should be vested in those to whom the debts, if recovered, would belong. For, upon the same principle, if lands be devised to a man's executor, until out of the profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to his executors, because they being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund out of which he has directed them to be paid.

omit (c) *The Common Law Mortgage.*

LIT. § 332. *Of Estates upon Condition.* Item, if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c., 40 pounds of money, that then the feoffor may re-enter, &c.; in this case the feoffee is called tenant in mortgage, which is as much to say in French as *mort gage*, and in Latin *mortuum vadum*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay at the day limited such sum or not: and if he doth not pay, then the land which is put in pledge upon condition for the payment of the money, is taken from him forever, and so dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the tenant, &c.

reason for calling it mortgage! Why?

§ 333. Also, as a man may make a feoffment in fee in mortgage, so a man may make a gift in taylor in mortgage, and a lease for term of life, or for term of years in mortgage. And all such tenants are called tenants in mortgage, according to the estates which they have in the land, &c.

may ulge in tail, for life for yrs.

§ 334. Also, if a feoffment be made in mortgage upon condition that the feoffor shall pay such a sum at such a day, &c., as is between them by their deed indented agreed and limited, although the feoffor dieth before the day of payment, &c., yet if the heir of the feoffor pay the same sum of money at the same day to the feoffee, or tender to him the money, and the feoffee refuse to receive it, then may the heir enter into the land, and yet the condition is, that if the feoffor shall pay such a sum at such a day, &c., not making mention in the condition of any payment to be made by his heir, but for that the heir hath interest of right in the condition, &c., and the intent was but that the money should be paid at the day assessed, &c., and the feoffee hath no more loss, if it be paid

heir may pay

by the heir, than if it were paid by the father, &c.; therefore, if the heir pay the money, or tender the money at the day limited, &c., and the other refuse it, he may enter, &c. But if a stranger of his own head, who hath not any interest, &c., will tender the aforesaid money to the feoffee at the day appointed, the feoffee is not bound to receive it.

Stranger can
pay.

§ 335. And be it remembered that in such case, where such tender of the money is made, &c., and the feoffee refuse to receive it, by which the feoffor or his heirs enter, &c., then the feoffee hath no remedy by the common law to have this money, because it shall be accounted his own folly that he refused the money, when a lawful tender of it was made unto him.

see below

§ 337. Also, if a feoffment be made upon condition, that if the feoffor pay a certain sum of money to the feoffee, then it shall be lawful to the feoffor and his heirs to enter: in this case if the feoffor die before the payment made, and the heir will tender to the feoffee the money, such tender is void, because the time within which this ought to be done is passed. For when the condition is, that if the feoffor pay the money to the feoffee, &c., this is as much to say, as if the feoffor during his life pay the money to the feoffee, &c., and when the feoffor dieth, then the time of the tender is passed. But otherwise it is where a day of payment is limited, and the feoffor die before the day, then may the heir tender the money as is aforesaid, for that the time of the tender was not passed by the death of the feoffor. Also, it seemeth, that in such case where the feoffor dieth before the day of payment, if the executors of the feoffor tender the money to the feoffee at the day of payment, this tender is good enough; and if the feoffee refuse it, the heirs of the feoffor may enter, &c. And the reason is, for that the executors represent the person of their testator, &c.

If cond. is for
payment by
feoffor then
his death
makes it
perform in-
pos. & feoffee
gets land.

Heirs may
pay.

§ 338. And note, that in all cases of condition for payment of a certain sum in gross touching lands or tenements, if lawful tender be once refused, he which ought to tender the money is of this quit, and fully discharged forever afterwards.

Co. Lit. 209, a, b. This is to be understood, that he that ought to tender the money is of this discharged forever to make any other tender; but if it were a duty before, though the feoffor enter by force of the condition, yet the debt of duty remaineth. As if A. borroweth a hundred pounds of B., and after morgageth land to B. upon condition for payment thereof. If A. tender the money to B. and he refuseth it, A. may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt. But if A. without any loan, debt or duty preceding infeoff B. of land upon condition for the

tender does
not discharge
debt.

But if no inde-
pendent liability
for money but
is secured only by then
the deed of mortgage
tender ends all liability
since it is perf'd the cond.

See marginal notes.

In Welsh mortgage the mortgagee gets the land & takes profits - instead of interest. He has no remedy except to keep on taking profits. Mortgagor has perpetual right to redeem.

payment of a hundred pounds to B. in nature of a gratuity or gift. In that case if he tender the hundred pounds to him according to the condition, and he refuseth it, B. hath no remedy therefor, and so is our author in this and his other cases of like nature to be understood.

omit
 LIT. § 339. Also, if the feoffee in mortgage before the day of payment which should be made to him, makes his executors and die, and his heir entereth into the land as he ought, &c., it seemeth in this case that the feoffor ought to pay the money at the day appointed to the executors, and not to the heir of the feoffee, because the money at the beginning trenched to the feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the feoffee, or for some other duty; and, therefore, the payment shall not be made to the heir, as it seemeth, but the words of the condition may be such, as the payment shall be made to the heir. As if the condition were, that if the feoffor pay to the feoffee or to his heirs such a sum at such a day, &c., there after the death of the feoffee, if he dieth before the day limited, the payment ought to be made to the heir at day appointed, &c.

*Mortgagor said
ordinarily
pay execs
not heir of
mortgagor.*

2 BLACKSTONE, COM. 157. There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are:—

*related to
res, vadio;
a security.* Estates held in vadio, in gage, or pledge, which are of two kinds, vivum vadium, or living pledge, and mortuum vadium, dead pledge, or mortgage.

Vivum vadium, or living pledge, is when a man borrows a sum (suppose £200) of another, and grants him an estate, as of £20 per annum, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and immediately on the discharge of that, results back to the borrower. But mortuum vadium, a dead pledge or mortgage (which is much more common than the other), is where a man borrows of another a specific sum (e. g. £200) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of £200 on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall reconvey the estate to the mortgagor. In this case, the land, which is so put in pledge, is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the

*Living pledge
explained.*

*Mtge ex-
plained.*

*Same meaning
to "dead" pledge
as Littleton.*

Points out claim that
 wife's dower
 if anyone has one.
 Make stated instead go
 to representation of
 wife or person
 really entitled.

Reason for
 putting long
 term of
 years in-
 stead of
 per se.

Mtgee may
 take pos.
 Contract is
 Contra Comm.

Explains
 eq. vs description
 began about
 1600

Qc for rights
 of mortg.
 mortg.

Explains
 for closure.
 foreclosure by
 sale the ordin-
 ary method.
 Foreclosure of
 Equity v. o. d.

is called strict foreclosure.
 At Comm. use it still usually.
 Tiffany. R. Prop. §550-558.

lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money and time allotted for payment, the mortgagee is called tenant in mortgage. But as it was formerly a doubt, whether, by taking such estate in fee, it did not become liable to the wife's dower and other incumbrances of the mortgagee (though that doubt has been long ago overruled by our courts of equity), it, therefore, became usual to grant only a long term of years by way of mortgage, with condition to be void on repayment of the mortgage money, which course has been since pretty generally continued principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, whatever nature the mortgage may happen to be.

As soon as the estate is created, the mortgagee may immediately enter upon the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And, therefore, the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility at law of being afterward evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest and expenses; for otherwise, in strictness of law, an estate worth £1000 might be forfeited for non-payment of £100, or a less sum. This reasonable advantage, allowed to mortgagors, is called the equity of redemption; and this enables a mortgagor to call on the mortgagee who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the mortuum into a kind of vivum vadium. But on the other hand, the mortgagee may either compel the sale of the estate in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default thereof, to be forever foreclosed from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages, the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate unless

even when he has
 not agreed to let
 mortg. keep it.

Could find no authority. Since one who comes into equity
must have clean hands it seems ok.

See marginal notes.

where the security is precarious, or small; or where the mortgagor neglects even the payment of interest; when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was, where the possession of the thing pledged remained with the debtor. But by statute 7 Geo. II., c. 20, after payment or tender by the mortgagor of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his security. In Glanvil's time, when the universal method of conveyance was by livery of seisin or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor: "*Si non sequatur ipsius vadii traditio, curia domini regis huiusmodi privatas conventiones tueri non solet*;" for which the reason given is, to prevent subsequent and fraudulent pledges of the same land, "*Cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari*." And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

old
Mortgagee
takes possession
seems nec. to
his security.
Jong, 49
Mortg. may stop
ejectment by
paying after 7
Geo. II. c. 20. after
def. 19. 1839.
cf. p. 6 ante
+ p. 4-5. 1849
if done
in Kio. Ch. so
as to be in
a word prob.
good.

COOTE ON MORTGAGE, 5, 9. The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville, as has been observed, gives a different meaning to the origin of the term. He says, "*Mortuum vadium dicitur illud cuius fructus vel redditus interim percepti in nullo se acquiescant*,"¹ and applies it to the before mentioned species of usury at common law, viz., a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the mean time; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, and while yet the fetters on alienation were unremoved. We may therefore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained un-

Glanville's
idea of
meaning of
usage adopted.
also adopted
by Chaplin.
444. 2. R. 8.
by Hazelline in
17th p. 8. 552.
See p. 5 ante

¹ Lib. 10, cap. 6; page 4, *supra*.

diminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury; and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz., that the estate was never lost. . . .

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse, and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment or in a deed of defeazance executed at the same time (for the common law does not allow a feoffment to be defeazanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him the legal estate instantly vested, subject to the condition. If the condition was performed, the feoffor re-entered and was in of his old estate, paramount all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post*, or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally to the feoffee, as the lord by escheat and the husband by curtesy. If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment. But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium*. And in order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring that until breach of condition the mortgagor might hold the estate; and, on the other hand, the mortgagor engaged that, in such event, he would do all lawful acts for further assurance.

Although the common law did not favor conditions, but required strict performance of them, yet it was in certain cases satisfied with the performance of the intent of the condition, though not performed in words; and although a difference was taken between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates. . . .

Describes
C.L. mortgage
well.

Mortgage favored
by C.L. so far
as it cond. of
cond. of mortgage
performed as
near as could
be was suff.

? cf. p. 17 → where Spence
says C.L. was strict. & see
p. 19 → the way the Ct. actually
dealt with cond. seems just
construction.

Thus mortgages stood at common law, incumbered with the system from which they originated, and attended with ruinous consequences to the unfortunate debtor; and it is difficult to conceive, had the Courts of law been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property.¹

Happily, a jurisdiction was arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor. . . .

Id. 10. It has been already said, that by the civil law the debtor might redeem the estate on payment of his debt at any time before sentence passed. It has been seen how decidedly opposed to this is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of equity, a flagrant injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. No wonder then that our Courts of equity, founded on the principles of the civil law, should, as they increased in power, attempt, by an introduction of those principles, to moderate the severity with which the common law followed the breach of the condition. They did not indeed make the attempt of altering the legal effect of the forfeiture at common law; they could not, as they might have wished, in conformity to the principles of the civil law, declare that the conveyance should, notwithstanding forfeiture committed, cease at any time before sentence of foreclosure, on payment of the mortgage-money; but leaving the forfeiture to its legal consequences, they operated on the conscience of the mortgagee, and acting *in personam* and not *in rem*, they declared it unreasonable that he

Eg. doctrine

¹Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it. Thus, in Beaumont and Fletcher:

Alathe.—Thou hast undone a faithful gentleman,
By taking forfeit of his land.

Algripe.—I do confess. I will henceforth practise repentance.
I will restore *all mortgages*, forswear abominable usury.
The Night Walker, or Little Thief.—Coote.

Equitable jurisdiction of equity courts to avoid penalties on the ground.

should retain for his own benefit what was intended as a mere pledge; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest, and costs, notwithstanding the forfeiture at law.

of a daughter's equity jurisdiction began about 1600.

Against the introduction of this novelty, the Judges of common law strenuously opposed themselves; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, and in the result, the law of mortgage fell almost entirely within the jurisdiction of equity. There is no record of the time when this equity was first granted. In the before-mentioned cases of *Wade*¹ and *Goodall*,² which were decided towards the end of the reign of Queen Elizabeth, the parties do not seem to have entertained the idea of any remedy existing for the mortgagor's relief, if the forfeiture was established at law, although Tothill mentions a case in the 37th year of Elizabeth's reign,³ in which the equity was decreed; and it must soon after this time have been generally in practice, for there is a case decided in the first year of Charles the First,⁴ in which the doctrine seems fully admitted. It was a question as to a mortgage term which had been forfeited by non-payment according to the condition; and the Court held, that although the money was not paid at the day, but afterwards, yet the term ought to be void *in equity*, as well as on a legal payment it would have been void at law. In the intermediate reign of King James the First, the Courts of equity became established in power, and the same period may be reasonably assigned as that in which the doctrine of equity of redemption was fully recognised. . . .

omit

SPENCE, *EQUIT. JURIS.*, 601. The doctrine that a pledge should be forfeited on non-payment at the day, which seems to have prevailed throughout Europe, was considered by the clergy so inequitable, that at the Council of Lateran, A.D. 1178, *temp.* Hen. II., at which bishops from all parts of Christendom attended, it was declared (no doubt with reference to the doctrines which Constantine had promulgated) that where a creditor had been paid his debt and expenses out of the profits, he should restore the pledge to the creditor.⁵

1187-9. So attch: not recorded in King's Ct yet probably was remedy in Ecclesiastical Courts.

The king's court, as we learn from Glanville, took no cognizance of agreements to pledge, which were not perfected by delivery; these were left to the Court Christian, as cases of *fidei laesio*, of which that

¹ 5 Co. 115.—Coote.

² *Ibid.* 96.—Coote.

³ *Langford v. Barnard*, Tothill, 134.—Coote.

⁴ *Emanuel College v. Evans*, 1 Rep. in Chancery, 10.—Coote.

⁵ *Matt. Paris*, 114-5.—Spence

court then had cognizance;¹ the king's court, therefore, took no notice of questions as to the priorities of creditors, by way of mortgage or pledge, where the legal interest did not pass.²

Mortgages of lands appear to have been common in the time of Hen. VI. and Edw. IV. Sometimes they were in the form that the feoffee should take the profits till the mortgagor paid him the debt. Where property was delivered or conveyed as a security, and the debt was duly paid, the Court of Chancery compelled a redelivery or reconveyance of the mortgaged property under its general equitable jurisdiction, and the ancient common law jurisdiction appears to have been superseded. Where the condition in a mortgage deed was not performed so that the property was forfeited, the Courts of Law continued to adhere to the ancient doctrine, and would not allow the smallest liberality in the construction of such conditions. If the default happened from accident, or any other cause that afforded grounds for relief under the general jurisdiction to relieve against penalties and forfeitures, the Court of Chancery interfered; or, if there were any other acknowledged equitable ground, as a collateral agreement that, notwithstanding the forfeiture, the mortgagor should have a right to redeem. But it was a long time before the Court of Chancery could obtain jurisdiction to relieve where the pledge was actually forfeited, and there were no special circumstances.

cf. p. 5 →
Com. Law jurisdiction
dictum exp.
planted.

Relief by Ch.
in special
cases prior
to Eq. redem.
proper.

It is stated by Sir Matthew Hale, that the Parliament in the 14th Rich. II. would not admit of redemption after forfeiture;³ but it appears, on reference to the Parliament Rolls, that the case referred to was a petition addressed to Parliament by a person who alleged, that the mortgage money had been paid before the time: all parties were ordered to attend, and on debate it appeared, "as Seignors du Parliament," that the matter was cognizable at law; so the petitioner took nothing by his suit.⁴

The general jurisdiction to relieve against a forfeiture actually incurred appears to have been introduced in this way. Great favour was always shown to sureties, even at law. By Magna Charta, c. 8, the pledge was not to be distrained if the principal debtor were sufficient to pay; but this growing troublesome to the creditor, it fell into use that the pledge should be bound as the principal. However, it seems to have been considered in the Court of Chancery, that

Origin of
Eq. redem.
let sureties
whose land
was pledged
were allowed
to redeem
after day, a
idea that the
did not have
to pay until
after principal
made default.

¹ So late as 8 Edw. IV. (Y. B. fo. 4) Bishop Stillington, Chancellor, held that for breach of faith (*pro lacione fidei*) a man was at liberty to sue either in the spiritual court (*Canonica Injuria*), or else in the Chancery, for the damage occasioned by the breach.—*Spence*.

² Beames [Glanville], p. 257, lib. x. c. 12.—*Spence*.

³ *Roscarrick v. Barton*, 1 Ch. Ca. 219.—*Spence*.

⁴ Rot. Parl. vol. iii. No. 10, p. 258, 9.—*Spence*.

where a person gave a mortgage as *surety* only, if he paid the debt due from the principal debtor with interest even after the day, he did all that he really contracted to do, for it was only on non-payment that he was to be called upon; and out of favour to him the rigid doctrine of the law as to the time of payment was relaxed. Thus an advantage was given to the surety that the principal debtor had not, for he could only obtain relief on grounds that were applicable to forfeitures generally.

From this time down to the reign of James I., we find the notion of the existence of a general equity in the mortgagor himself to redeem after forfeiture, gradually gaining ground.

In 1625 both
redemption
& foreclosure
appear.

At length, in the reign of Charles I. it was established, that in all cases of mortgage, where the money was actually paid or tendered, though after the day, the mortgage should be considered as redeemed in equity, as it would have been at law on payment before the day; and from that time bills began to be filed by mortgagees for the extinction or foreclosure of this equity, unless payment were made by a short day to be named.¹

The jurisdiction which the Court of Chancery exercises in regard to the equity of redemption of mortgaged premises, so far as regards the co-existent legal rights, is, in some respects, analogous to that which it exercises as regards trust estates, where the mortgage is created by a deed which conveys the legal estate. The Court, to a certain extent, controls the exercise of the legal incidents of the estate or interest which is acquired, making it subservient to the purposes for which it is assumed that it was created, namely, security only; but there is this material difference, that the holder of the legal estate is not, as in the case of a trustee, completely at the command of the court, for the mortgagee does not acquire it in the character of trustee, or for the purposes of the mortgagor or that it may continue to be subservient to the equitable interest. So long, however, as the mortgagee suffers the equitable interest to exist, which, unlike a trustee, he may at his pleasure put an end to by filing a bill for foreclosure, the Court of Chancery moulds and directs the enjoyment and transmission of that equitable interest according to rules and doctrines of its own, though here also taking the common law rules as to property as its guide, just as in the instance of a trust estate, of which we have lately treated. The estate in the hands of the mortgagee and his representatives, is considered, for almost all purposes, as personal estate; the equity of redemption is treated as an estate in the land, and as having all the qualities and incidents of real estate; when the mortgage money is paid off the mortgagee becomes in the nature of a trustee for the mortgagor; but the full consideration of these subjects cannot be entered upon at present.

In dealing
with eq. & leg.
the rules of
law as to
descent down
not as to
land by
Equity. Same
in trust.

¹ *Emanuel College v. Evans*, 1 Ch. Rep. 11, 1 Cha. I.—*Spence*.

See marginal notes.

Take up ? of intgor transferring his eq. as
showing history.

4 KENT, COM., 140. The law of pledges shows an accurate and refined sense of justice; and the wisdom of the provisions by which the interests of the debtor and creditor are equally guarded, is to be traced to the Roman law, and shines with almost equal advantage, and with the most attractive simplicity, in the pages of Glanville.

It forms a striking contrast to the common-law mortgage of the freehold, which was a feoffment upon condition, or the creation of a base or determinable fee, with a right of reverter attached to it. The legal estate vested immediately in the feoffee, and a mere right of re-entry, upon performance of the condition, by payment of the debt strictly at the day, remained with the mortgagor and his heirs, and which right of entry was neither alienable nor devisable. If the mortgagor was in default, the condition was forfeited, and the estate became absolute in the mortgagee, without the right or the hope of redemption. So rigorous a doctrine, and productive of such forbidding, and, as it eventually proved, of such intolerable injustice, naturally led to exact and scrupulous regulations concerning the time, mode, and manner of performing the condition, and they became all-important to the mortgagor. The tender of the debt was required to be at the time and place prescribed; and if there was no place mentioned in the contract, the mortgagor was bound to seek the mortgagee, and a tender upon the land was not sufficient. If there was no time of payment mentioned, the mortgagor had his whole lifetime to pay, unless he was quickened by a demand; but if he died before the payment, the heir could not tender and save the forfeiture, because the time was passed. If, however, the money was declared to be payable by the mortgagor, or his heirs, then the tender might be made by them at any time indefinitely after the mortgagor's death, unless the performance was hastened by request; and if a time for payment was fixed, and the mortgagor died in the mean time, his heir might redeem, though he was not mentioned, for he had an interest in the condition. If the representatives of the mortgagee were mentioned in the feoffment, whether they were heirs, executors, or assignees, the payment could rightfully be made to either of them.¹

Id., 158. In ascending to the view of a mortgage in the contemplation of a court of equity, we leave all these technical scruples and difficulties behind us. Not only the original severity of the common

¹ Goodall's case, 5 Co. 95; Co. Litt. 210. This case of Goodall, and Wade's case, 5 Co. 114, are samples of the discussions on what was, in the time of Lord Coke, a very momentous question, whether the absolute forfeiture of the estate had or had not been incurred by reason of non-payment at the day. Such a question, which would now be only material as to the costs, was in one of those cases decided, on error from the K. B., after argument and debate, by all the judges of England.—Kent.

Determinable fee
doesn't require
re-entry to make
title. Difficult
Rule p. 192.

Le mortgagor retains the
right of entry a party
to the mortgage
Tome, p. 192.

which he don't a fee.
present in court. See
Coke at Ed. 4. p. 114. L. 114.
Coke at Ed. 4. p. 114. L. 114.
Coke at Ed. 4. p. 114. L. 114.

At. Coke p. 117
Like it, generally at
C.L. See
below that
mortgagor's int.
is alienable
in equity
20

law, treating the mortgagor's interest as resting upon the exact performance of a condition, and holding the forfeiture or the breach of a condition to be absolute, by non-payment or tender at the day, is entirely relaxed; but the narrow and precarious character of the mortgagor at law is changed, under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law, and the case of mortgages is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may well say, that "returning justice lifts aloft her scale." The doctrine, now regarded as a settled principle, was laid down in the reign of Charles I., very cautiously, and with a scrupulousness of opinion. "The Court conceived, as it was observed in chancery, that the said lease being but a security, and the money paid, though not at the day, the lease ought to be void in equity."¹ The equity of redemption grew in time to be such a favorite with the courts of equity, and was so highly cherished and protected, that it became a maxim, that "once a mortgage, always a mortgage." The object of the rule is to prevent oppression; and contracts made with the mortgagor, to lessen, embarrass, or restrain the right of redemption, are regarded with jealousy, and generally set aside as dangerous agreements, founded in unconscientious advantages assumed over the necessities of the mortgagor. . . .

Law adopts
Eq. rules.

1. on 12. 1. A.

Eq. redemp:
about 1625

W. later.

Eq. doctrine

So in equity—
mortgagor's interest
is alienable.

In many Am
Cts.

The equity doctrine is, that the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee. The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law.² The courts of law have, also, by a gradual and almost insensible progress, adopted these equitable views of the subject, which are

¹ *Emanuel College v. Evans*, 1 Rep. in Ch. 10. In the case of *Roscarrick v. Barton*, 1 Cases in Ch. 217, Sir Matthew Hale, when chief-justice, showed that he had not risen above the mists and prejudices of his age on this subject, for he complained very severely of the growth of equities of redemption, as having been too much favored, and been carried too far. In 14 Rich. II., the Parliament, he said, would not admit of this equity of redemption. By the growth of equity, the heart of the common law was eaten out. He complained that an equity of redemption was transferable from one to another, though at common law a feoffment or fine would have extinguished it; and he declared he would not favor the equity of redemption beyond existing precedents.—*Kent*.

² 1 Vern. 7, 232, and 2 Vent. 364.—*Kent*.

Les marginal notes.

founded in justice, and accord with the true intent and inherent nature of every such transaction. Except as against the mortgagee, the mortgagor, while in possession, and before foreclosure, is regarded as the real owner, and a freeholder, with the civil and political rights belonging to that character; whereas the mortgagee, notwithstanding the form of the conveyance, has only a chattel interest, and his mortgage is a mere security for a debt. This is the conclusion to be drawn from a view of the English and American authorities.¹

omit

TROWBRIDGE, READING ON MORTGAGES, 8 Mass. Rep., 551. Among conditional estates are mortgages of land and tenements. These are sometimes of the freehold and inheritance, and sometimes for a term of years only.

1. Of the freehold and inheritance: Where a feoffment is made upon condition, that if the feoffor pay the feoffee £40 at a certain day, then he shall re-enter, &c. Here the land and all the feoffor's estate in it pass presently to the feoffee by common law; and the feoffor has only the condition left, and no estate in the land that he can assign over (Co. Lit. 205 a, 210 a). So if one here, by deed duly acknowledged and registered, conveys his land to another and his heirs upon the like condition, the land and all the mortgagor's estate in it pass presently to the mortgagee by force of the provincial act of 9 Will. 3, c. 7 (1 P. Will. 74). . . .

It is objected to this doctrine, that Lord Mansfield, in considering what species of property a mortgagee has in the estate mortgaged, lately said (2 Burr. 978, 979), that "a mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not

Mansfield used some of the equity ideas of a judge at law. Trowbridge shows that his statements are too strong & bad at law. But they started modern notions in a way.

¹ *The King v. St. Michaels*, Doug. 630; *The King v. Edington*, 1 East, 288; *Jackson v. Willard*, 4 Johns. 41; *Runyan v. Mersereau*, 11 *ibid.* 534; *Huntington v. Smith*, 4 Conn. 235; *Willington v. Gale*, 7 Mass. 138; *M'Call v. Lennox*, 9 Serg. & Rawle, 302; *Ford v. Philpot*, 5 Harr. & Johns. 312; *Wilson v. Troup*, 2 Cowen, 195; *Eaton v. Whiting*, 3 Pick. 484; *Blaney v. Bearce*, 2 Greenl. 132. The growth and consolidation of the American doctrine, that until foreclosure the mortgagor remains seised of the freehold, and that the mortgagee has, in effect, but a chattel interest, and that it goes to the executor, as personal assets, and though, technically speaking, the fee descends to the heir, yet he is but a trustee for the personal representatives, and need not be a party to a bill by the executor for a foreclosure, was fully shown and ably illustrated by the Chief-Justice of Connecticut, in *Clark v. Beach*, 6 Conn. 142, and by the Chief-Justice of Maine, in *Wilkins v. French*, 20 Maine, 111; and by the Chancellor of New Jersey, in *Kinna v. Smith*, 2 Green, 14; and these general principles were not questioned by the courts.—*Kent*.

made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence, nay, it would do it though the debt were forgiven only by parole; for the right to the land would follow, notwithstanding the statute of frauds" (3 Cha. Rep. 3).

Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed nor redeemable, the judge of probate has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever, in fee. . . .

This argument shows that it is not to be possible to apply strictly by a notion that mortgage is personally. When Equit. doctrine is adopted at law still the dual nature must be kept in mind.

In order the better to settle the authority of these propositions, said to have fallen from Lord Mansfield, it may not be amiss, first to consider the third proposition, viz.: "that the estate in the land is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing as the money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. It renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord Mansfield did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the close as land, it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple which the mortgagee had in the close by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent,

agreeably to what Lord Keeper Wright said in *Gilb. Eq. Ca. 3*, in the case of a mortgage in fee.

The money due on the mortgage could not, by Lord Mansfield, be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money, so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee: That the former was but a chattel and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of Chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together; as though there was no difference between them, which is not reasonable to suppose Lord Mansfield ever did; and, therefore, it must be supposed the reporter did not take down the restrictions, with which his lordship qualified his propositions, and left them to be implied by the reader. . . .

For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not revest the fee in him in law, nor even in equity; because the mortgagee is deemed in such a case by the Court of Chancery a trustee of the mortgagor, &c., until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land (3 Chan. Rep. 3). And surely, forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance. . . .

Upon the whole the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, even after it has become irredeemable, may be distributed by the judge of probate as personal estate," is evident. . . .

Authorities showing the estate, both legal and equitable, to be in the mortgagee: 2 Atk. 352-4; 2 Cha. Ca. 97; 1 Cha. Ca. 285.¹

¹ "If the estate on which a pauper resides is substantially his property, that is sufficient whatever forms of conveyance there may be; and therefore a mortgagor in possession gains a settlement, because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only a security. It is an affront to common-sense to say the mortgagor is not the real owner." . . . —Per Lord Mansfield, in *The King v. St. Michaels*, Doug. 632 (1781).

Payment after the law day does not invest the fee in mtgor.

Another statement by Mansfield?

(d) *The Equitable Mortgage.*

note which did not convey legal title for lack of livery of seisin. Major dies. His wife suffers T's to taken on bonds of

BURGH v. FRANCIS.

COURT OF CHANCERY, 1673.

(Rep. temp. Finch, 28.)

ancestors. Plt's mortgage prays to have mortgage declared valid & good

vs T. cur'd This bill was brought by the executors of the mortgagee against the heir of the mortgagor, to perfect a defective deed of mortgage by feoffment, without livery ~~and~~ seisin, and to be relieved against certain judgments confessed by the defendant Henry Francis, and *Held for Plt's* by Sherrer and his wife, by collusion to defeat the plaintiffs.

next defect in the mortgage at law. This is trustee for mortgagee.

The defendants acknowledge by their answers, that they had confessed several judgments all in one term, and most of them at the same time, and to several persons for considerable sums of money, which they set forth, but deny they were since the bill exhibited, tho' they cannot tell when the warrants of attorney were sealed.

Cur'd by getting legal T's do not get any advantage. They should be postponed to mortgage.

This cause being heard by the LORD KEEPER BRIDGMAN, he directed the matter to be examined before a master, and more particularly whether the bill was a new or an amended bill, and when the judgments were obtained, and when the warrants of attorney were dated and sealed, and whether the judgments were confessed after the bill, and after notice of the mortgage; and after the master had made his report, he would give his opinion, &c. the cause was reheard by the LORD SHAFTSBURY, and an accommodation proposed, which took no effect, and being now reheard by the LORD KEEPER FINCH, he decreed that the plaintiffs should be relieved, and that the several judgments ought not to incumber the mortgaged premisses, until the mortgage money was all paid.

This decree was not founded on the manner of obtaining these judgments, nor on the special way by which they were endeavored to charge the lands, viz., by pleading that the heir had nothing by descent besides the lands in mortgage, nor upon the priority of the *teste* of the subpoena, which was before the *teste* of the originals upon which the judgments were had, but it was founded on the nature of the case.

For the debt due upon this mortgage did originally charge the land which the debts by bond did not, till they were reduced into judgments; and altho' the mortgage was defective in point of law for want of livery, yet equity, which supplies that defect, did still charge the land, and it ought not to be in the power of the heir

Shows good rule, that where parties intend to have a mortgage or agree to make a mortgage, tho the mortgage is for some reason ineffectual at law, Equity will treat it as complete & enforce it accordingly.

Forms of equitable mortgage:

- (1) Where equity permits an ~~absolute~~ deed absolute as it passes to be shown by parol to be a mortgage, might be so classified. Usually is not & is taken up later. Legal title in dif. place at C. & L.
- (2) Conveyance intended to be a mortgage but ineffectual to pass title at law. New case.
- (3) Agreement to give a mortgage. New case.
- (4) ~~Documents passing title at law but not~~ ^{as security for a loan.}
- (5) Assignment of Contr. of purchase. Vendor in equity = to a 1st mortgage & then assignee a 2nd mortgage. Not a mortgage at law as vendor hasn't legal title.
- (6) Deposit of title deeds. Used in Eng. Has a meaning in Eng. where lack of registry system makes title deeds important. Generally held no good in U.S. ~~though in S.Ct. has been held~~ ^{up later.} ~~that~~ ^{has been mere recognitions of} ~~has been mere recognitions of~~ ^{doctrine in S.Ct. this. But not law any} ~~where.~~

Case remains the law today despite fact that in 1677 St. Frds passed requiring writing for conveyance of int. in land & that St. applies to Equity as well as legal interests. Point is that you have a writing showing intent to have mortgage tho not a good conveyance. Case shows Eq. mortgage good vs all but B. & P. Attaching Card not a B. & P.

Not a defective conveyance but a power to make mortgage.

Uddo nothing except shows that eq. int. mortgage is no good vs. B.F.P's. That clearly so. Could have had notice here. Suppose had no notice. Still no B.F.P's unless surrender debt, forbear or like. If merely take security & get T-lien that not purchase. Possibly Eq. int. mortgage should have been held back on ground that some of Hampshire state too indefinite in its terms.

at law to charge it, by acknowledging judgments in prejudice to such equity; the rather, because in this cause it appeared, that the mortgagor had covenanted for him and his heirs, to make any farther assurance; so that when the land descends upon the heir charged with this mortgage, he is in nature of a trustee for the mortgagee till the money is paid, and cannot incumber it; and tho' the creditors had not any notice of this mortgage, yet they shall be bound in this case, because they are not put in a worse condition than they ought to be, viz., to be postponed to the mortgage; and it appeared in proof, that the heir once offered to pay the mortgage money, but upon sight of the defect of the deed he refused, and presently acknowledged all those judgments on bonds, on purpose to load the land with incumbrances, and in effect to pay his father's debts with the money due on the mortgage.

Wherefore the decree was, that the defendant Henry Francis, who was to be heir at law, shall convey to the plaintiffs, or to such whom he shall appoint, a sufficient and perfect estate of inheritance in the premisses, in such manner as the master shall direct, subject to be redeemed upon the payment of the principal and interest due on the former defective deed, and the said lands shall be held as mortgaged, and be quietly enjoyed against the defendants, and all claiming under them since the date of the former mortgage; and that he, to whom the redemption doth belong, may exhibit his bill in convenient time, or in default thereof the plaintiff may exhibit his bill to foreclose.

And a perpetual injunction was awarded to quiet the plaintiff's possession against all the said defendants, and to stay all proceedings at law, but no costs until redemption, or the plaintiff enforced to exhibit his bill to foreclose, and then costs to be allowed as in such cases.

was borrowed money of Willis & wrote him a letter, saying he wd utge to him "Some part of his Hampshire estate. Later Stewart utged this prop. to others in trust for all his crs do. The agent of trustees & crs. who drew up deed knew of

SIR SIMEON STEWART'S CASE.
COURT OF CHANCERY.

(2 Sch. & Lef. 381.)

The late Sir Simeon Stewart being embarrassed in his affairs, made a conveyance to the late Lord Delaware, Sir H. Tichborne, and others, in trust, for the payment of his debts. Previous to executing that conveyance, a gentleman of the name of Willis had been prevailed on by Sir Simeon Stewart to lend him a large sum of money; and Sir Simeon wrote him a letter, in which he stated that he would make a mortgage to him on some part of his Hampshire estate; and the question was, whether that was a contract *letter to Willis. Held letter was a suff. utge & trustees having notice they got it b'd them*

which bound the trustees, who were trustees for general creditors. The creditors insisted they were purchasers for valuable consideration, without notice of this contract. The fact of notice could not be brought home to the creditors; but it was sufficiently established that the persons who prepared the trust deeds, and were therefore the agents of the creditors and the trustees in that transaction, had full notice: and therefore the only question was, whether this bound the estate in the hands of the trustees, as being an equity affecting Sir Simeon Stewart, prior to his conveyance; for if it bound him, the consequence would be that it bound his trustees, under the circumstances of that deed. The Court did determine that the letter was sufficient to bind him.—Per Redesdale, L. Ch., in *Card v. Jaffray*, 2 Sch. & Lef. 374 (1805).

not
B.F.P's.

argument to
utge good in
equity.

omit.

judicial view
of Executory
Contracts.
for sale of
land. Vendor
treated in
Equity as
owner.

POMEROY, EQUITY JURISP., § 368. The full significance of the principle that equity regards and treats as done what ought to be done throughout the whole scope of its effects upon equity jurisprudence is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels, which presents such a striking and complete contrast with the legal method above described. While the legal relations between the two contracting parties are wholly *personal*—things in action—equity views all these relations from a very different standpoint. In some respects and for some purposes, the contract is executory in equity as well as at law; but so far as the interest or estate in the land of the two parties is concerned, it is regarded as executed and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards these as done: the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as *the owner of the land*; an equitable estate has vested in him, commensurate with that provided for by the contract, whether in fee, for life or for years; although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, having a lien on the land, even if in possession of the vendee, as security for any unpaid portion of the purchase money. The consequences of this doctrine are all followed out. As the vendee has acquired the full equitable estate—though still wanting the confirmation of the legal title for purposes of security against third persons—he may

If verbal mtg of chattels is that good. at
C.L. O.K. whether St. Frs applies not
fully settled. Prob. does not. Today
almost if not quite universally the
require writing & recording to make
mtg good vs Creds or purchasers.
Some sts require re-record every
so often.

convey or encumber it; may devise it by will; on his death, intestate, it descends to his heirs and not to his administrators; in this country his wife is entitled to dower in it; a specific performance is, after his death, enforced by his heirs; in short, all the incidents of a real ownership belong to it. . . .

Id. § 1235. The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and purchasers or encumbrancers with notice. Under like circumstances, a merely verbal agreement may create a similar lien upon personal property. The ultimate grounds and motives of this doctrine are explained in the preceding section; but the doctrine itself is clearly an application of the maxim, equity regards as done that which ought to be done.¹ . . .

States Equitable mortgage rule. written.

Equit. Mgtg. of personalty is good. the real.

¹ "The doctrine seems to be well established that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so intended to be mortgaged (1 Am. Lead. Cas. in Eq. 510; *Howe's Case*, 1 Paige, 125). The maxim of equity upon which this doctrine rests is, that equity looks upon things agreed to be done as actually performed; the true meaning of which is that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been (Story, Eq. Jur., secs. 64 and 790; Will. Eq. Jur. 289, 299)."—*Per* Curry, Ch. J., in *Daggett v. Rankin*, 31 Cal. 321 (1866).

BOOK II.

ESSENTIAL ELEMENTS OF MORTGAGE.

CHAPTER I.

CONVEYANCE.

SECTION I.—MORTGAGE, PLEDGE AND LIEN.

omit.
Trove. Pltff pawned hat-band. Pledge became ill. His wife, by his order, gave band to deft. Pledge died. Wife Exec. Pltff tendered RATCLIFF v. DAVIES.

Went to wife. She refused. KING'S BENCH, 1610.

Pltff demanded of deft. He refused. Held for pltff. (Cro. Jac. 244.)

Not necessary to redeem. ACTION of Trover and Conversion of an hatband set with pearls and diamonds; upon not guilty pleaded, a special verdict was found, that the plaintiff was possessed thereof, and pawned it to John Whitlock for £25, but no certain time appointed for the redemption thereof; that Whitlock being sick, his wife in presence, and with his assent, delivered it to the defendant, and afterward he made his said wife his executrix, and died, who proved the will; that the plaintiff tendered to the said executrix the said £25, who refused, and afterward demanded the hatband of the defendant, who refused to deliver it; but converted it to his own use: whereupon, &c. And in this case three points were moved:

Exec. was First, there being no time appointed for the redemption, whether it may be made after the death of him to whom it was pawned, or ought to be in the lives of both the parties, and all the justices resolved, it may be well made after the death of him to whom it was pledged, but not after the death of him who pledged it. YELVERTON and CROKE doubted, and held, that it could not; for he at his peril ought to redeem it in his time, as it is upon a mortgage; but writing it is liable.

1. Can property be redeemed ~~before~~^{after} pledgor's death?
Vulgarly now a time is set for payment & so
case doesn't arise. But no doubt case
OK. Kent approved of it (See card).

If a time for payment were set of course
it could be redeemed after death of pledgor. No
body ever claimed contrary probably.

* No doubt same thing wd be held as
to utges (on both pts above) if? ever arose.

2. Can property be redeemed after pledgor's death
No time set. Mtge cd not unless right

to pay was expressly reserved to mtgor
and his heirs. ^{and} But Kent held other-
wise as to pledges ^{and} adopting Fleming's

view that mtge and pledge are
dif. (In other reports of our case it ap-
pears that maj. of Ct. that right to redeem
died with pledgor, because personal.)

No doubt mtge & pledge dif. ^{title passes} ~~the house~~ on Cond
other men security & title doesn't pass.
But this seems immaterial. Real dis-

~~tribution is that in mtge case~~ And
that makes a dif. In mtge condit. subseq.
becomes impo. of prop. & so mtge has per-
fect title. Granting when no time set

that pledgor is in default if he does
not pay during life. Yet default
does not vest a complete title in
pledgee even at C.L. After default
the pledgor may redeem & on tender of
amt being repaid or terms for pledge.

So granting that default occurs at
pledgor's death yet that does not prevent
redemption at law.

Suppose time set. Here again nobody

ever claimed contrary either as to mtges
or pledge. Death only set time of default
when no other time set. (See cards).

3. Evidently the transfer of prop to debt was simply
as act to hold & collect. If so tender to person
really having claim was proper. Seems anyway
terminated by death anyhow. If attempt to trans-
fer for pledge separate from debt that no good. If
legal title passed transferee wd hold it in
trust for person owning claim. (Card).

4. That tender releases the int. of pledgor in pledge
is settled law. Of course does not bar d.b.t.

Additional Notes on Ratcliff & Davies, 28.

FLEMING and the others against it: for pledging doth not make an absolute property, but it is a delivery only until he pays, &c., so it is a debt unto the one, and a retainer of the thing unto the other: for which there may be a re-demand at any time upon the payment of the money. For the pledge delivered is but a security for his money lent, so as he who borrows the money is to have again his pledge when he repays it, and his tender gives him interest therein; and there is difference between mortgage of land and pledging of goods; for the mortgagee hath an absolute interest in the land, but the other hath but a special property in the goods, to detain them for his security (5 Hen. VII., 1; 9 Ed. IV., 25; 36 Ed. III. Bar., 188).

In case of
pledge for
loan not
pass.

Secondly, it was resolved, that by this delivery of the said goods by the *feme*, with the assent of her *baron*, to the defendant, there passed no interest of them to the defendant, but (as it were) a custody only: and therefore the tender of the redemption ought to be made to the executrix, and not to the defendant.

Thirdly, that when he tendered the money to the executrix, and she refused, it was as good as payment; and the especial property of the goods is revested in the plaintiff: then, when he demanded them of the defendant and he refused to deliver them, but converted them to his own use, a trover and conversion well lies, although he came unto them by a lawful delivery, and not by trover.

Pleading.

Wherefore it was adjudged for the plaintiff.

up later.
Trove. G. pledged chronometer to deft. & then sold to plif.
Under pledge deft was to have right of sale if not re-
deemed in one year. Year up. Plif tendered money. Deft
refused to deliver.
FRANKLIN v. NEATE. *Held for plif. The st*
COURT OF EXCHEQUER, 1844. *of deft to sell did not*
(13 M. & W. 481.) *make this a utge instead*

COURT OF EXCHEQUER, 1844.

(13 M. & W. 481.)

This was an action of trover for a chronometer; to which the defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed of the chattel.

At the trial, before Parke, B., at the Middlesex sittings in last Trinity Term, it appeared that the chronometer for which the action was brought had been pledged, by a person named Gilbert, to the defendant, a pawnbroker, under a written agreement that it was deposited as a collateral security for the sum of £15, and interest; and that, in case Gilbert should not redeem it before twelve months, the defendant should be authorized to sell it, and repay himself principal and interest. The plaintiff afterward bought the chronometer from Gilbert, whilst it was in the defendant's hands, after the expiration of the year; he then tendered to the defendant the

of pledge
in case,
pledge deft
does not
get full
title but
only a spe
cial int
Pledgor
may sell

→ *pledge subject to pledgor's rts. Vendee from pledge*
gets title & all pledgor's rts. On tender he
may maintain action at law for con-
version.

For note see
off. 30.

amount due, and demanded possession of it, and on the defendant's refusing to deliver it, brought the present action. It was contended for the defendant, that no property passed to the plaintiff by the sale; that it was merely an assignment of a right of action, with an equity of redemption; and the learned Judge, being of that opinion, directed the jury to find their verdict in favor of the defendant; giving leave to the plaintiff to move to enter a verdict for him for the sum of £19 10s. *Humfrey* having, in the early part of this term, obtained a rule accordingly,

Petersdorff showed cause (Nov. 14).—The question here is, whether the assignee of the right of a pawnor to redeem an article pledged can maintain an action of trover against the party with whom it is pledged, he having refused to deliver it up. Now, that depends upon the contract made between the parties. The pawnee agrees to deliver the article to the party pledging it, but he does not undertake to deliver it to his assignee. The only right that the pawnor could give to the buyer was a right to claim restitution of the article pledged. The pawnor retained nothing more than a mere right of action. Suppose an injury had happened to the chronometer, could the assignee have sued the defendant? Or suppose the property pawned consisted of twenty different articles, could the pawnor, by selling them separately to twenty different persons, give each of them a right of action against the defendant? It is submitted he clearly could not. In *Story on Bailments*, p. 377, pl. 350, it is said, "Subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn; and in such a case the vendee will be substituted for the pledger, and the pledgee will be bound to redeem, and to account to him for the pledge and its proceeds. If he refuses, an action at law will lie for damages, as well as a bill in equity to compel a redemption and account." But it is not there said that an action of *trover* will lie. In *Rich v. Aldred*, 6 Mod. 216, which was an action of detinue for Oliver Cromwell's picture, it was ruled by Lord *Holt*, C. J., at Nisi Prius, that "if A. bail goods to C. and after give his whole right in them to B., B. cannot maintain detinue for them against C., because the special property that C. acquires by the bailments is not thereby transferred to B."—He also referred to *Ryall v. Rolle*, 1 Atk. 167; *Kemp v. Westbrook*, 1 Ves. sen. 278; *Reeves v. Capper*, 5 Bing. N. C. 136; 6 Scott, 877; *Legg v. Evans*, 6 M. & W. 36; *Clarke v. Gilbert*, 2 Bing. N. C. 343; 2 Scott, 520, and Com. Dig. tit. "Mortgage," B.

Humfrey (*Crouch* with him) in support of the rule. The pawnor retained a special property in the thing pawned, which he was capable of transferring to the plaintiff. The law as to pawns is derived from the civil law; and in *Story on Bailments*, pl. 307, it

- (1) The ? whether a chattel mortgage or a pledge was one of construction & it relied on terms of writing not set forth. (32 top) No doubt they were right. That power of sale is given does not necessarily make it a mortgage. The ? is was there an intent to have title pass subject to Credit. Subseq. And where things pledged is negot. paper very often the ^{legal} title passes & yet is held a mere pledge & not a chattel mortgage. ? of intent. If intent that pledgor shall lose all it to pledge if he doesn't pay on time then a mortgage - if intent that pledgor shd still only have a security int. & etc to pledgor for any excess then a pledge.
- (2) If pledge, pledgor has gen'l property & so can transfer it. ^{Before condition broken.} In case of mortgage of realty, at law mortgage has only it of entry which cd not under old law be transferred. In case of mortgage of chattels the mortgagee has a like int. in the chattel. Seems no reason however why it shd not be transferred. Generally held transferable today but cases can go on ground that law & eq. merged or in a very few states on ground that mortgage does not pass title. Also some cases confine it to where mortgagee ^{in possession}. After Cond. broken mortgagee of realty had nothing at law & so cd not transfer anything. Same ^{no doubt} true of chattel mortgage in almost all states. In states where mortgage whether of land or goods doesn't pass title might be dif. But mortgagee of land cd transfer his int. in equity even after default. No doubt that also true of mortgage of chattels. But a pledgee whether before or after default can be a gen'l owner & can transfer his interest. In our case it was after default. Notice also is at law so that transferee can bring trover.

(3) The note p. 30 is the classical authority that a pledgee may transfer his interest: that doing so does not destroy the pledge: that \therefore pledgor must tender amt due before he can bring any possessory action. Might so, tho' a very few cases are contra.

Of course citizens may in general transfer their interest. We have that up fully later.

is said, "In the Roman law it should seem that the pledgee has not property in the thing, but he has a mere right of detention or retainer. *Pignus, manente proprietate debitoris, solam possessionem transfert ad creditorem*; or, as we should say, the pawnee has a mere lien, and no property." In *Ryall v. Rolle*, BURNET, J., says, "The distinction between mortgages and pawns is laid down in Noy, 137, and in Cro. Jac. 245. There is a difference between mortgaging of lands and pledging of goods; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods, to retain them for his security." The passage cited on the other side from Story on Bailments, pl. 350, that "subject to the rights of the pledgee, the owner has a right to sell or assign his property in the pawn," is clearly in the plaintiff's favor; for, if the pawnor may sell the property pawned, all the consequences of the sale attach to the purchaser, and he may bring trover for a conversion of the chattel; for, by the sale of a chattel, the interest in it is transferred without delivery. It is a perfect fallacy to say that this was a mere assignment of a chose in action.

Cur. adv. vult.

The judgment of the Court was delivered on the 10th of December by

ROLFE, B. This was an action of trover for a chronometer. It appeared on the trial that the chronometer in question had been pawned by the owner with the defendant, and at the time of the pawn, the owner delivered to the defendant a written paper, authorizing him to sell if the chronometer was not redeemed within a year. The owner afterward sold it to the plaintiff, subject to the defendant's right as pawnee. The plaintiff, then, after the year had expired, tendered to the defendant the amount due on the pawn, but the defendant denied the plaintiff's right to redeem, and refused to deliver up the chronometer, and, therefore, the plaintiff brought this action. On this state of facts, the verdict on the issue on the plea denying the plaintiff's possession, was by the direction of my brother Parke, who tried the cause, taken for the defendant, with liberty, nevertheless, for the plaintiff to move to enter a verdict for him, with £19 10s. damages, in case the Court should be of opinion that he had proved the issue. The learned Judge was inclined to think that this was not the case of a simple pawn, but that the terms on which the chronometer was pledged were such as to give the defendant something more than the right of a pawnee, and operated as a mortgage. If he was a mortgagee, and the absolute property was transferred to him, defeasible upon repayment of the money advanced, the assignee of the right of redemption, which only remained in the original owner, could have

Terms of condition
creating pledge
relied on to
show not a
mortgage.

maintained no action of trover after tendering the money; but, considering the terms of the instrument which accompanied the deposit, we all agree in thinking, that, though they gave more than the ordinary right of a pawnee, viz., the right to sell, which, being part of the security for the advance, was irrevocable by the pledgor or his assignee, they did not constitute a mortgage or transfer of the entire legal property in the chattel itself. The case, therefore, stands on the same footing, as far as relates to the right of the pawnor, with an ordinary pledge.

A rule *nisi* having been granted, pursuant to the leave reserved, Mr. Petersdorff, for the defendant, showed cause, and contended that the verdict was right, on the ground that a pawnor cannot transfer to another such a right of possession as enables him to bring an action of trover. There is very little to be found in the books on the subject of the right of a pawnor over the chattel pawned; but this is very clear, that, notwithstanding the pawn, the pawnor still retains a qualified property; and, in the absence of direct authority on the point, this seems to us decisive in favor of his right to sell, and by the sale to transfer to the purchaser his qualified property in the goods pawned, together with all the rights incident thereto. The case was argued for the defendant, as if what this pawnor transferred, or sought to transfer, was a mere right of action. But this is not so; he transfers the property in the chattel, qualified, indeed, by the right existing in the pawnee, but still a right of property, and the right of action afterwards exists in the purchaser, not in consequence of its having been transferred to him by the original pawnor, but by reason of the pawnee having wrongfully converted to his own use that which by the sale became the property of the purchaser.

I no piece
must be
re-
servation.

We do not feel at all pressed by the argument *ab inconvenienti*, urged by Mr. Petersdorff. "If several chattels," he asked, "should be pawned for one sum, could separate sales be made of each to different purchasers?" We answer, undoubtedly they may; the pawnee will, of course, not be bound to part with any of the chattels until his whole debt is paid; but, subject to the claim of the pawnee, the pawnor has the same right over each chattel separately which he had before the pawn was made. Again, it is said, suppose the chattel is injured by default of the pawnee, while in his custody, who was to sue the pawnee, the original pawnor or the purchaser? The answer is obvious. The person with whom the contract is made, that is, the original depositor, is the proper plaintiff, if the action be for a breach of contract express or implied, unless a new one be made with the purchaser; the owner for the time being is the proper plaintiff, if the injury be by the destruction or conversion of the chattel; just as, in the case of a carrier, the

original employer is the person to sue for the loss for negligent carriage, or other breach of contract—the other subsequent purchaser for the conversion after the purchase.

That in ordinary cases of bailment, not by way of pawn, the bailor may sell, is a proposition admitting of no doubt; indeed, it is assumed to be law by Lord Holt, in one of the cases relied on by Mr. Petersdorff (*Rich v. Aldred*, 6 Mod. 216), where he says: "If A. bails goods to C., and after gives his whole right in them to B., B. cannot maintain detinue for them against C. because the special property that C. acquires by the bailment was not thereby transferred to B.," and there does not seem to be any solid ground of distinction, in this respect, between a bailment by way of pawn and any other bailment.

With so little then of direct authority, we must act on the general principle, that a pawnor, like every other bailor, retains his property in the goods pawned, subject only to the qualified property transferred to the pawnee; that as an incident to such property, he has the right of sale, and that after the sale the purchaser has the same interest in the chattel which the pawnor had. The rule must, therefore, be made absolute.¹

¹ "It appears to me that considerable confusion has been introduced into this subject by the somewhat indiscriminate use of the words 'special property,' as alike applicable to the right of personal retention in case of a lien and the actual interest in the goods created by contract of pledge to secure the payment of money. In *Legg v. Evans*, 6 M. & W. 42, the nature of a lien is defined to be a 'personal right which cannot be parted with;' but 'the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation.' Story on Bailments, § 311. In each case the general property remains in the pawnor; but the question is as to the nature and extent of the interest, or special property, passing to the bailee, in the two cases. Mr. Justice Story, in his treatise on Bailments, § 324, thus describes the right and interest of the pawnee: 'He may by the common law deliver over the pawn into the hands of a stranger for safe custody, without consideration, or he may sell or assign all his interest in the pawn, or he may convey the same interest, conditionally, by way of pawn to another person, without in either case destroying or invalidating his security; but if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee. The only question is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as in the case of a naked tort, without any qualified right in the first pawnee?' . . .

Pawnee has only special prop. but may part with his int. before Cnd broken

"There would therefore appear to be some real difference in the incidents between a simple lien, like that in *Legg v. Evans*, 6 M. & W. 36, and the lien of a broker or factor before the Factor's Act, and the case of a deposit by way of pledge to secure the repayment of money, which latter more

omit.

BROWN v. BEMENT.

SUPREME COURT OF NEW YORK, 1811.

Trover. Debt gave Debt's bill of sale of horses & chair. Debt gave Debt's defense. answer on payment in 14 days. (8 Johns. 75.) After 14 days were up, Debt offered amount, and Debt refused to deliver. Debt had sold one horse, the before or after 14 days not sure. Held for Debt. This was an action of trover, for three horses and a chair. The cause was tried at the Columbia Circuit, in September, 1810, before Mr. Justice Thompson.

The plaintiff proved that he was possessed of the horses and chair, and that, afterward, on the 26th of April, 1810, he tendered the sum of 283 dollars and 5 cents to Bement, one of the defendants, and demanded the horses and chair, who refused to deliver and said he had them, and referred the plaintiff to Strong, the other defendant. The plaintiff on the next day, made a tender of the same sum to Strong, and demanded the property, but Strong refused, saying the horses and chair were in possession of Bement. The defendants then produced in evidence an absolute bill of sale of the horses and chair to the defendants, under the hand and seal of the plaintiff, dated 27th October, 1809, for the consideration of 210 dollars

nearly resembles an ordinary mortgage, except that the pawnor retains the general property in the goods pledged which the mortgagor does not in the case of an ordinary mortgage. Notes to *Coggs v. Bernard*, 1 Smith's L. C. 194 (5th ed.). A lien, as we have seen, gives only a personal right to retain possession. A factor's or broker's lien was apparently attended with the additional incident that to the extent of his lien he might transfer even the possession of the subject-matter of the lien to a third person, 'appointing him as his servant to keep possession for him.' In a contract of pledge for securing the payment of money, we have seen that the pawnee may sell and transfer the thing pledged on condition broken; but what implied condition is there that the pledgee shall not in the meantime part with the possession thereof to the extent of his interest? It may be that upon a deposit by way of pledge the express contract between the parties may operate so as to make a parting with the possession, even to the extent of his interest, before condition broken, so essential a violation of it as to revert the right of possession in the pawnor; but in the absence of such terms, why are they to be implied? There may possibly be cases in which the very nature of the thing deposited might induce a jury to believe and find that it was deposited on the understanding that the possession should not be parted with; but in the case before us we have only to deal with the agreement which is stated in the plea. The object of the deposit is to secure the repayment of a loan, and the effect is to create an interest and a right of property in the pawnee, to the extent of the loan, in the goods deposited; but what is the authority for saying that until condition broken the pawnee has only a personal right to retain the goods in his own possession?—*Per Mellor, J., in Donald v. Suckling*, 1 Q. B. 585 (1866).

round action as a C.D. mortgage. After day is for the mortgage has no sh- at law & so cannot be any tender or like get right to maintain C.D. action - here there.

In connection with Ratcliff v. Davies, 28, we see that law is just other way as to pledges. Pledgor's right still remains after default, hasn't removed lien as soon as he said he would, but still he has legal title & all he has to do to make it perfect is to remove lien by paying or making tender.

With regard to mortgage of realty tender after default is also no good. See below *

Even payment after maturity does not discharge a realty mortgage since the title remains in mortgagee. Except by the usual way for the case of chattel payment after maturity vests the title. If mortgagee had surrendered pos. it would be returned to him & not be intent that he have full title & of course a delivery with intent to pass title is formality. Even if he already had pos the mere intent is enough.

See below *
Note formality can only be transferred in certain ways: (1) deed (2) delivery. So title really except that way.

~~In case of tender, however, there will be no such date.~~ Might have a case of tender payment w.o. return of pos. Is then called a waiver of forfeiture. Perhaps O.K. Can waive the non-perf. of a cond. ^{pro.} after breach in Contracts? Can you waive non-perf. of a cond. ^{sub.} in personal property, not much authority. ^{can as to personally ed also as to realty.}

* Must be added that in states where realty mortgage doesn't vest title, a ^{payment} ~~tender~~ after default discharge the lien. Perfectly O.K. ~~Like pledge~~ Mortgage is simply to secure debt - if debt falls it falls with it. No outstanding legal title to cause trouble. Will tender have same effect in those states? Doesn't discharge debt. Still case seems to be just like pledge. Practically all U.S. states hold mortgage

is discharged, tho' of course debt still re-
mains. Up fully later.

and 35 cents. And the plaintiff gave in evidence a writing bearing the same date, executed by the defendants, by which they stipulated, on the payment of 210 dollars and 35 cents to them, by the plaintiff, in 14 days from the date, to deliver to the plaintiff the horses and the chair; but if the property was lost in the meantime, they were not to be responsible; nor for any expenses attending the property during the time.

It was proved, that before the commencement of the suit, Bement had told the plaintiff he was willing to return the property which remained, but that one of the horses had been sold. The plaintiff answered, that if they could agree as to the price of the horse sold, that would create no difficulty. A verdict was found for the plaintiff, by consent, subject to the opinion of the Court; and it was agreed that if the plaintiff was entitled to recover the whole property, the verdict should be entered for 438 dollars; but if for the one horse only which had been sold, then the verdict was to be for 85 dollars; and if the Court should be of opinion that the plaintiff was not entitled to recover at all, then a judgment of non-suit was to be entered.

Three points were raised for the consideration of the Court:

1. That the writing given by the defendants to the plaintiff made the property a pledge, redeemable at any time.

2. That on tender of the money, the plaintiff's right of action was complete.

3. That the plaintiff was entitled, at least, to recover the value of the horse sold.

Per Curiam. The plaintiff has not shown a right of action. Here was a complete transfer of the title to the goods in question, with a condition of defeasance, on the payment of 210 dollars and 35 cents, in 14 days. This was a mortgage, not a technical pledge; and all that was said in the case of *Cortelyou v. Lansing* (2 Caines's Cases in Error, 200) respecting the nature and redeemableness of pledges, has no application to the case. The distinction between a pledge and a mortgage of goods was recognized by this court in *Barrow v. Paxton* (5 Johns. Rep. 258). A mortgage of goods is a pledge and more: for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas the pawnee has but a special property in the goods to detain them for his security (2 Ves. Jun. 378; 1 Powell on Mort. 3). The title of the defendants here became absolute after the 14 days; and though it does not appear whether one of the horses was sold after or before the expiration of the time to redeem, that omission is not material, as no attempt was made, in season, to redeem.

Judgment of nonsuit must, therefore, be entered according to the stipulation in the case.

omit.

BRACE v. MARLBOROUGH.

COURT OF CHANCERY, 1728.

(2 Peere Wms. 491.)

After a decree which referred it to a master to state the several incumbrances and their priority, affecting the estate of Sir William Gostwick, this case arose: A puisne judgment creditor bought in the first mortgage without notice of the second mortgage when he lent his money on the judgment, and the question was, whether this puisne judgment creditor should tack and unite his judgment to the first mortgage, so as to gain a preference on his judgment before the mesne mortgage? And the Master of the Rolls [Sir Joseph Jekyll] on considering the cases and precedents, held,¹

Facts.

Held -

1. Third mortgagee may tack because he gets legal title & is a purchaser. *through the 2nd mortgagee's judgment creditor cannot tack to 1st mortgage because he gets no title to land, only a lien. 2nd mortgagee no fraud on him.*
2. First mortgagee who gets judgment may tack judgment to his mortgage. *he has title to the land and loans further sum on faith of it.*

First. That if a third mortgagee buys in the first mortgage, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgage; and this the Lord Chief Justice Hale called a plank gained by the third mortgagee, or tabula in naufragio, which construction is in favor of a purchaser, every mortgagee being such pro tanto.

Secondly. If a judgment creditor, or creditor by statute or recognizance buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference: for one cannot call a judgment, &c., creditor, a purchaser, nor has such creditor any right to the land; he has neither *jus in re*, nor *ad rem*, and, therefore, tho' he releases all his right to the land he may extend it afterward. All that he has by the judgment is a lien upon the land, but *non constat* whether he ever will make use thereof; for he may recover the debt out of the goods of the cognizor by *fieri facias*, or may take the body, and then during the defendant's life he can have no other execution; Besides, the judgment creditor does not lend his money upon the immediate view or contemplation of the cognizor's real estate, for the land afterward purchased may be extended on the judgment, nor is he deceived or defrauded, tho' the cognizor of the judgment had before made twenty mortgages of all his real estate, whereas a mortgagee is

Extend that is tacked it by equity & not by law.

¹ Only so much of the opinion is given as deals with the question under consideration.

(1) 1st? has been discussed fully in trusts. 1st we get legal title, 2nd 1st mortgage has Equities 2nd mortgage being prior in time prevails. 1. if the later Equity holder becomes a B.F.P. then he prevails. If he buys in the legal title to notice of 2nd mortgage shd prevail. If he has notice when he gets it in shd not. See Ames Cas. Trusts, 291, 296-7. In Eng taking allowed the notice. In Am. not. On Ames's theory that Equity is transferred to 2nd mortgage & then a subordinate Equity is to 2nd mortgage we seem 2nd mortgage ought have preference tho he bought without notice - his it then is not a direct Equity vs land but an Equity vs 2nd mortgage's Equity. Perhaps seems B.F.P. of legal title would not get him out of his trouble. as he has still to claim thru 2nd mortgage. But shd be kept in mind that mortgage had a legal vs - the it of entry in perf. of cond. which is non-assignable. So unless 2nd mortgage take his mortgage after default on 1st mortgage he does not get all mortgage has. ? if he does anyhow. Is an equity negotiable? Up fully in trusts. In U.S. Recording Laws generally not discussion Academies. But not usually so. Suppose Mortgage to B. A record. Neither B nor C record. Put here to show how mortgage passes legal title. Of course can't pass a legal title to 2nd & 1st mortgage. But usually by doctrine of title by estoppel when 1st mortgage is discharged 2nd mortgage gets legal title.

(2) Rule that T-lien can't tack seems O.K. T-lien is peculiar. More like privilege of having subsequent lien relate back to date of docketing T. than anything else. All prior incumbrances are good vs. it whether legal or equitable. Yet can't be destroyed by B.F.P. since on record & so always constructive notice. So to make it relate back to 1st mortgage & out 2nd mortgage wd be inconsistent with its theory. Could find nothing on tacking as in our case (over)

(3) The "Fourthly" ruling seems in concert with last & unsound. If T. lien can't relate back ~~to~~ so as to ant 2nd mtge it can't for 1st mtge who gets it any more than for lienor who buys 1st mtge. If it were like a 2nd mtge probably shd relate back in both cases if no notice. Depends on whether you adopt Ames's view or not. Now is there any essential dif. in Equities in the two cases.

Note that a Ct of equity has to recognize nature of mtge as passing title in order to determine priorities bet.

(1) Ct refused to decide that priority of Ch. was or was not greater than any lien - left that open - but did decide that not greater than mtge. Thus distinguishing mtge & liens on just that title passes in mtges of personality. Clearly O.K. except in 2 or 3 states where law that mtge of personality is a mere lien.

(2) How ed mtge being terapens de bonis? Surely today mt of mtgor who has it to pos for a definite period is ~~not~~ subject to levy sale on execution. But here (a) perhaps mtgor had no such it to pos for definite period, in which case levy wd be wholly wrong. Or (b) debt may have been as if mtgor absolute owner when he shd be liable for conversion. the same cases contra.

defrauded or deceived if the mortgagor before that time mortgage his land to another; and 'tis such a fraud as the Parliament takes notice of and punishes by foreclosing such mortgagor who mortgages his land a second time, without giving notice of the first mortgage, and in that respect this case differs from a puisne mortgagee's buying in the first mortgage.

Fourthly. If a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee, till both the mortgage and statute or judgment be paid; because it is to be presumed that he lent his money upon the statute or judgment, as knowing he had hold of the land by the mortgage, and in confidence ventured a farther sum on a security, which, tho' it passed no present interest in the land, yet must be admitted to be a lien thereon.

Prof. brings Thompson de bonis, U.S. got a J. & debt, an insolvent of Dist. Col. levied it on certain land which the J. debtor had.

omit.

CONARD v. ATLANTIC INSURANCE CO., 1 Peters, 386 (1828). Action of trespass *de bonis asportatis* brought in the Circuit Court of the United States for the District of Pennsylvania, by the Atlantic Insurance Company to recover against the defendant, John Conard, the Marshal of that district, the value of certain teas shipped on board the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States against one Edward Thompson, as the property of the latter. . . . The cargoes had previously been transferred by Thompson to the Insurance Co. by assignment of the bills of lading to secure the payment of a *respondentia* bond. It was held that this constituted a mortgage. The defendant contended that the statutory priority of the United States (Stat. 1799, c. 128, § 65) extended to this case. The Supreme Court overruled the claim in an opinion by Mr. Justice Story, from which the following is taken (440):

"Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself a lien, is yet superior to any lien, and even to an actual mortgage, on the personal property of the debtor."

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect, and that in the eye of a Court of Equity a mortgage is but a lien for a debt. *Thelluson v. Smith*, 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court in that

entitled to the U.S. claimed it had priority St. It had a lien. It was to all the property owned by debtor. Held: for the statute gives it priority in property owned by debtor. But property mortgaged in conveyed away. Mortgage creates more than a lien. Even in equity mtg. is a conveyance tho' qualified by the various equities in it.

case is conclusive on the point of a mortgage. [“The United States,” said he, “are to be first satisfied; but then it must be out of the debtor’s estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person, or has mortgaged the same to secure a debt; or if his property has been seized under a *fieri facias*, the property is divested out of the debtor and cannot be made liable to the United States.”] The same doctrine may be deduced from the case of the *United States v. Fisher*, 2 Cranch. 358, where the Court declared that “no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes,” and “that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee.” If so plain a proposition required any authority to support it, it is clearly maintained in *United States v. Hoos*, 3 Cranch, 73.

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.

omit.

Attachment not a lien, at common law
lien depends on possession
attaching property not having possession
prob. is in case of land
for illustration
is for establishment of claim
as attachment, claim is not established. In equity possession not nec. to lien, but estab. claim is necessary. This is not present in attachment.

Ex parte FOSTER, 2 Story, 131, 142 (1842). “But it is said that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof, and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are relied on to establish and confirm these positions. . . . “It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien, and doubtless it is so in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance which it bears to liens, generally recognized as such at the common law, or in equity, or in maritime jurisprudence. But, as an attachment, claim is not established. In equity possession not nec. to lien, but estab. claim is necessary. This is not present in attachment.”

Lien at C. L. is a rt to retain pos. until pd.
Lien in admiralty & equity is independent of pos
but requires an established claim. In equity
it is only a charge on a thing not a rt in
it.

Attachment is not lien in any of above
senses. Goods are in custody of law:
real property is left in pos of owner but
Charge vs. it is contingent & not fixed
till judgment.

has been truly said by Lord Coke, no simile holds in everything. *Nullum simile quatuor pedibus currit.* [Lord Tenterden has said that the word lien, in its proper sense, in the law of England, imports that the party is in possession of the thing that he claims to detain, and that where there is no possession, actual or constructive, there can be no lien.] [And this is generally true, perhaps universally true at the common law, independently of statutory provisions, or of special contract.] The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow v. Mason*, before the House of Lords (6 East., R. 21, note; *id.* 25), where he says: 'Liens exist at law only in cases where the party entitled to them has the possession of the goods, and if he once part with the possession after the lien attaches, the lien is gone.' . . .

lien C.L.

"In equity, also, liens exist independent of possession, either actual or constructive; as, for example, the lien of a vendor on the land for the unpaid purchase money. But it has been the long established doctrine, in equity, that a lien is not, in strictness, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. It is, therefore, at most, a simple right to possess and retain property until some charge attaching to it is paid or discharged; or a mere right to maintain a suit *in rem* to enforce payment of the charge. Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: 'Liens are not founded on property, but they necessarily suppose the property to be in some other person, and not in him who sets up the right. They are qualified rights.'

"Now, an attachment does not come up to the exact definition or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is in *custodia legis*, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognize or enforce any claim as a lien, until it has become absolute, fixed and vested. Not in that of equity jurisprudence, for there a lien is not a *jus in re* or a *jus ad rem*. It is but a charge upon the thing, and then only when it has, in like manner, become absolute, fixed and vested." . . . —Per Story, J.

Summary

omit:
6/6/77/5097

CHAPTER I. (Continued.)

SECTION II. AFTER-ACQUIRED PROPERTY.

PERKINS, LAWS OF ENGLAND (about 1550). Grants. § 65. Now

Grant of rent charge on land which grantor does not bind land (subsequently purchased). is to shew of things to be granted or charged: And as to that know, that it is a common learning in the law, that a man cannot grant or charge that which he hath not: And therefore, if a man grant a rent charge out of the Manour of Dale, and in truth he hath not anything in the Manour of Dale, and after he purchase the Manour of Dale, yet he shall hold it discharged.

Disseisor of land cannot transfer to a third party, at release of confirmation to Disseisor. § 86. And, therefore, if the Disseisor of one acre of land grant his right unto a stranger, it is nothing worth; but if he release all his right unto the Disseisor, it is good, if it be by deed. And if he confirm the estate of the Disseisor, the confirmation is good.

one may grant part of which is potentially increased; examples. § 90. A Parson of a Church may grant his tythes for yeares, and yet they are not in him at the time. But if Lord and Tenant be, the Lord cannot grant the wardship of the heir of the Tenant, living the Tenant. But if a man grants unto mee all the wooll of his sheep for seven yeares, the grant is good, &c.

GRANTHAM v. HAWLEY.

COURT OF COMMON PLEAS, 1615.

(Hobart, 132.)

Robert Grantham brought an action of debt upon an obligation of £40 against Edward Hawley, the condition whereof was, that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it £20. Now the case upon the pleading and demurrer fell out thus: That one Sutton was seised of the land, and 30 Eliz., in April made a lease of it to Richard Sankee for 21 years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take and carry away to his own

at law one cannot grant & so cannot utge
property in which he has no present interest.
\$65 O.K. at law. Subject to title by stoppel.

\$86 is the C.L. rule as to dispositive & O.K.
now generally overturned, but not everywhere. Ma
ximum of 90 years under the provisions. Started with 1st Hen VIII.
\$90 points out that at law one may grant
that of which he is potentially possessed.

Wool from sheep, clear case. Will grow w/o
human labor & certainly. Wardship

Equally clear cannot grant. Tenant wa
live until ward comes of age & so there
be no wardship. Tythes were incorporated

hereditaments. They were appropriated to mon
asteries who in return were to supply &
ligious care to parish. Hen. VIII Confiscated
them on visiting Catholic church & granted
them to laymen who were called lay in
propriators or lay rectors. No doubt was
ditable in their hands. Plainly there

a present estate in real property - like
a right of profit - & so could be mortgaged.
see articles in Eng. & Eng. Law. on Tithes,
Rectors & Lay Proprietors.

Grant v. Harvelly, 40.

When term ends & crop not removed it belongs to landlord unless something shown to contrary. Was there a sale of it by landlord to tenant here? Court held there was though crop of course not even planted at the time. Potential ex-istence enough. But what is potential.

One might well sell natural product of land, that is seed to accrue. But product to arise from seed later to be brought & work in sowing & culti- vating is ~~potentially~~ hardly potentially in ~~possession~~ ^{possession} of land. Yet may.

of jurisdiction follow our case.

Note Judge requires a conveyance, a sale, not merely a contract to sell. So cases as to whether can have sale are cases as to whether can have utge.

use such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff, and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by *Hutton* for the plaintiff, that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not. Also, the lessor never had property in the corn; and, therefore, could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accretes with the land to the lessor, and it was said to be adjudged. And it was agreed by the Court that if A. seised of land sow it with corn, and then convey it away to B. for life, remainder to C. for life, and then B. die before the corn reapt; now C. shall have it and not the executors of B., though his estate was uncertain. Note, the reason of industry and charge in B. fails, yet judgment in this case was given against the plaintiff, that is, that the property and very right of the corn, when it hapned, was past away, for it was both a covenant and a grant. And, therefore, if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now, though corn be *fructus industrialis*, so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land; and, therefore, the executor shall have it, and not the heirs; yet in this case, all the colour, that the plaintiff hath to it, is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, not certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore, he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 H. 6. A parson may grant all the tithewool that he shall have in such a year; yet, perhaps, he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property, for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not *ex vi termini*, gives the trees.

Facto.

Need: for
deft. Sutton
could grant
corn to Sankee
because he has
it potentially
in his power
∴ rectly
has no right
to it.

Examples.

omit.

Mtgs of after-acquired
machinery. Creditors
must obtain judgment
before writs take pos.
Held writs have not
right.

See 15,
28

HOLROYD v. MARSHALL.

THE HOUSE OF LORDS, 1861.

(10 H. L. C. 191.)

James Taylor carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for 5000*l*. An indenture, dated the 20th September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for 5000*l*., but could not then pay the purchase money, wherefore it was agreed, &c. that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises')" were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of 5000*l*., with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys, in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of 5000*l*. contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisoes, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, &c. will at all times, during such continuance as aforesaid, at the request, &c. of the said Holroyds, their executors, &c. do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under the 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and ex-

Then clearly no potential ownership and so no good at law.

Case represents great weight of authority that as soon as property comes into ownership of Intgor the Intgee gets an Equitable int. in it which is good vs all but B.F.P's.

What is theory? ^{which is a rule of equity} (a) As to land it goes ~~on the theory of title by Estoppel.~~ In some states title actually passes if consent of any kind: in all ^{as to} Estoppel of grantor to assert that it didn't pass whether consent or not is case of prepayment, fines, & reverses it passes. (Tiffany, § 456 for title by Estoppel) (b) As to land Intgor as future property and as to Chattels (Seems no title by Estoppel as to Chattels perhaps not be if conveyed by deed)

What is theory?

Up under Telford v. Menden, 1879

(a) When Intgee purports to convey property as if existing & owned at time the doctrine of title by Estoppel may apply. Are cases applying this to personally or well as realty. Conflict as to just when doctrine applies. (Probably conveyance must contain ^{consent of} warranty, further assurance, title, or release so as to create estoppel, or else contains a recital of title so as to create Estoppel by deed. Bigelow, Estoppel, 3rd, Ch. II full discussion.) Conflict as to whether title really passes or whether only an Estoppel to deny its passing. If latter only an Equity & not good vs. B.F.P's. That better view. So if title passes, becomes legal Intgee into Intgor gets title; if title doesn't pass, becomes Equit. Intgee from deed Intgor gets title. Latter better view. Little authority.

(b) Suppose Intgee states plainly that Intgor hasn't present title & purports to Intgee it when it comes into existence. Then no title by Estoppel: nothing in con-

sistent believing mortgage & a showing that title was conveyed ^{obtained} & subsequently. That is what mortgage anticipated. So on obtaining title later it does not pass to mortgage nor is mortgage stopped to show that ~~he~~ it didn't pass under mortgage - Every body knew it wouldn't.

Our Ct says it passes because Equity will grant spec. perf. of cont. to sell personally. But that isn't so. (Notice note bot. 106.)

Ct in that note says will spec. enforce because mortgagee has pd his money & so contract not wholly executory. But that makes no diff. (card) Nor does fact that chattel is specific make any diff. (card)

But a cont. to give a mortgage on a specific chattel shd be enforced. No adequate remedy at law. Suppose plaintiff at law how much can he recover ~~by~~ ^{for} not getting mortgage. Perhaps when debt matures debt will be solvent & pay it - if so no damages. Evidently no damages are certain until debt has matured, isn't pd, ordinary execution fails wholly or partially. But if plaintiff has to wait until then he is wholly deprived of his mortgage. He can only get his debt: no doubt he can only prove for amt. of his debt vs. solvent estate, to allow to prove for diff. b/w amt. of debt & div. on pd that he lost that by not getting mortgage wd be really double prof. Anyhow wd be inad. Equate as wd then not get full amt. of debt. So Eq. shd grant spec. perf. of a contract to give a mortgage.

~~But in our case is no cont. to~~

And in our case was a cont. to give a mortgage See 42 →. So might have gone on above reason. As soon as cont. was capable of spec. perf. by chattel coming into pos. then Eq. wd spec. enforce & so.

changed some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860, but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the 5000*l.* and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of *scire facias* against Taylor for the sum of 155*l.* 18*s.* 4*d.*, damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for 138*l.* 3*s.* 3*d.*, was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favour of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice-Chancellor Stuart, who, on 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the Vice-Chancellor's order was reversed. This present appeal was then brought.

Mr. Malins and Mr. G. V. Yool for the appellants.

Mr. Amphlett and Mr. Hobhouse for the respondents.

THE LORD CHANCELLOR (LORD WESTBURY), after stating the facts of the case, said: My Lords, the question is, whether as to the machinery added and substituted since the date of the mortgage the title of the mortgagees, or that of the judgment creditor, ought to prevail. It is admitted that the judgment creditor has no title as to the machinery originally comprised in the bill of sale; but it is contended that the mortgagees had no specific estate or interest in the future machinery. It is also admitted that if the mortgagees had an equitable estate in the added machinery, the same could not be taken in execution by the judgment creditor.

The question may be easily decided by the application of a few elementary principles long settled in Courts of equity. In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consid-

||| no new act.

Admitted in Equity -
and in J. C. C. (Kor)
was Eq. Eq.
grant sp. l.
perf. y. cont.
for specific
personally.
So when per-
sonally is.
Common spe-
cific. So
how when
prop. put
in mill
the Eq. are
tacked.

eration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true, not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a Court of equity would direct to be specifically performed.

Enor. A contract for the sale of goods, as, for example, of five hundred chests of tea, is not a contract which would be specifically performed, because it does not relate to any chests of tea in particular; but a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse in Gloucester, is a contract relating to specific property, and which would be specifically performed. The buyer may maintain a suit in equity for the delivery of a specific chattel when it is the subject of a contract, and for an injunction (if necessary) to restrain the seller from delivering it to any other person.

The effect in equity of a mere contract as amounting to an alienation, may be illustrated by the law relating to the revocation of wills. If the owner of an estate devises it by will, and afterwards contracts to sell it to a purchaser, but dies before the contract is performed, the will is revoked as to the beneficial or equitable interest in the estate, for the contract converted the testator into a trustee for the purchaser; and, in like manner, if the purchaser dies intestate before performance of the contract, the equitable estate descends to his heir at law, who may require the personal representative to pay the purchase money. But all this depends on the contract being such as a Court of equity would decree to be specifically performed.

There can be no doubt, therefore, that if the mortgage deed in the present case had contained nothing but the contract which is involved in the aforesaid covenant of Taylor, the mortgagor, such contract would have amounted to a valid assignment in equity of the whole of the machinery and chattels in question, supposing such machinery and effects to have been in existence and upon the mill at the time of the execution of the deed.

Admits law rule. But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an

+ no transfer in equity.

suit is that judge has Equit. title.

But suppose no cont. to give a further
judge. Then can't have spec. perf. But
it is like any other case of an Equit.
judge which is based on view that
Equity will consider that as done
which was intended to be done & which
ought to be done. There is a judge
intended. Unfortunately because of
strict rules of law it cannot
serve as such as it isn't a legal
conveyance. Equity will hold it
a judge. Clearly led if prop. in ex-
istence & when future prop.
is acquired no reason why same
rule sh'dn't apply.

Of course is no transfer in Equity
~~But the judge gets an equitable lien~~
~~on property & when~~ until prop. comes
into existence. But then judge be-
comes the equitable owner.

If new act, which ^{almost always} ~~probably~~ means
taking pos., then title passes at law.
47 ← 50 → ^{Perhaps no suff. new act to make}
^{good at law. 52, no authority}

If is Equity good vs judgement
Cord vs. notice (51 ←) but in our
case had notice (53 →).

immediate alienation merely because there is nothing to transfer.

But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

Equity rule.

Spec. perf.

O.K.

Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.

There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property. The result is, that the title of the appellants is to be preferred to that of the judgment creditor.

note

Some use was made at the bar and in the Court below of the language attributed to Mr. Baron Parke in the case of *Mogg v. Baker*, 3 M. & W. 198. That learned Judge appears to have given, not his own opinion, but what he understood would have been the decision of a Court of equity upon the case. He is represented as speaking upon the authority of one of the Judges of the Court of Chancery. Any communication so made was of course extra-judicial, and there is much danger in making communications of such a nature the ground of judicial decision; but I entirely concur in what appears to have been the principle intended to be stated; for Mr. Baron Parke, speaking of the agreement in the case, says, "It would cover no specific furniture, and would confer no right in

equity." I have already explained, that a contract relating to goods, but not to any specific goods, would not be the subject of a decree for specific performance, and that a contract that could not be specifically performed would not avail to transfer any estate or interest.

If, therefore, the contract in *Mogg v. Baker* related to no specific furniture, it is true that it would not, at the time of its execution, confer any right in equity; but it is equally true that it would attach on furniture answering the contract when acquired, provided the contract remained in force at the time of such acquisition.

Whether a correct construction was put upon the agreement in *Mogg v. Baker* is a different question, and which it is needless to consider, as I am only desirous of showing that the proposition stated by the learned Judge is quite consistent with the principles on which this case ought to be decided.

I therefore advise your Lordships to reverse the order of Lord Chancellor Campbell, and direct the petition of rehearing presented to him to be dismissed, with costs.

LORD CHELMSFORD. My Lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your Lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this House, but that he was supported in it by my noble and learned friend Lord Wensleydale, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned Lord upon the Woolsack, before whom the last argument took place. His great learning and long experience in Courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which

At law for
must be taken
but in Eq.
not. Any
how all new
acts done
that ed he.
Then also
creditors,
had notice
as unfor-
was he.
ended.

were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them?

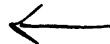
The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case—see *ante*.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed? or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants?

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or, in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? [If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void (*Robinson v. Macdonnell*, 5 Maule & S. 228). But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree,¹ and the property would pass.]

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio præcedens* in the words of the maxim; and although Chief Justice Tindal, in the case of

Rule at law.



Note

¹ *Licet dispositio de interesse futuro sit inutilis, tamen fieri potest declaratio præcedens quæ sortiat effectum, interveniente novo actu.*

Lunn v. Thornton, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant, that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of *Congreve v. Evetts*, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in *Hope v. Hayley*, 5 Ellis & B. 830, 845 (a case much relied upon by the Vice-Chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, "The intention of the contracting parties was, that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced

No nec. to
make transfer
good at law

by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in *Mogg v. Baker*, 3 M. & W. 195, 198, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the *corpus* was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." [The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.]

Spec. perf.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon, in the case of the ship *Warre*, 8 Price, 269, n., in support of it. [It must also be observed, that the proposition in *Mogg v. Baker* hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.]

Why not
equi. mtge
Seems and he
from this prop.
comes into ex-
istence & so
same. Agree-
ment to give
mtge when
prop. arises
is not a mtge
until then
because can't
be a mortgage
no agreement
to give it un-
til then.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties, and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a Court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell resting, as he states, upon

Important
→

Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bona fide* acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of *Langton v. Horton*, 1 Hare, 549, which was relied upon by the respondents as a conclusive authority in their favor. I need not say that I examine every judgment of that able and careful Judge, Vice-Chancellor Wigram, with the deference due to such a highly respected authority. *Langton v. Horton* was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The Vice-Chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of *fi. fa.*, his Honor, assuming that the equitable title which was good against the assignor would not, under the circumstances of the case, be available against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favour upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the Vice-Chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord Cottenham in the case of *Whitworth v. Gaugain*, 1 Phill. 728.

[The noble and learned Lord then discusses the case of *Whitworth v. Gaugain*, and concludes as follows:]

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee

over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord St. Leonards, "any agreement binding property for valuable consideration" will confer a similar right.

It does not appear from this review of the case of *Whitworth v. Gaugain*, that it could have had any influence over the question in *Langton v. Horton*, as to the imperfection of the mortgagee's title, unless something had been done to perfect it. The point does not appear to have been at all noticed by Lord Cottenham, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. *Langton v. Horton* must therefore be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the Vice-Chancellor said, "impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken; and on the arrival of the ship at the port of London, the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. *Langton v. Horton* may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress upon this case, to urge it as an authority that an equitable title would have been defective if certain circumstances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not

take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied "a new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed.

LORD WENSLEYDALE. My noble and learned friend will forgive me, but that was not mentioned in the bill.

LORD CHELMSFORD. My noble and learned friend is quite correct in that; it must be taken that that was not mentioned in the bill, and that was the answer given when I urged, in the course of the argument, that that account must be taken to be a sufficient *actus*. But still I am stating what my views are of the whole of the case. I think that the account delivered by Taylor to the mortgagees of the whole machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary; no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mort-

Novus actus

gagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of *Metcalf v. The Archbishop of York*, 1 Mylne & C. 547, 555, said that if the plaintiff, in that case, was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favor of the judgment creditor. If Lord Cottenham really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

→ The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict., c. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed. . . .

The following order was afterwards entered on the Journals:

"That the decree or decretal order of the Court of Chancery, of the 22d of December, 1860, be reversed; and that the petition for

was registered & so notice.

rehearing, presented by the said respondent, Emil Preller, to the Lord High Chancellor, be dismissed, with costs; and that the cause be remitted back to the Court of Chancery, to do therein as shall be just, and consistent with this judgment."

omit.

MOODY v. WRIGHT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847.

(13 Metcalf, 17.)

Mtge of property assigned prop. not good against creditors unless pass. is taken
Mtge of prop. sent of future stock, fixtures, etc. of a tan-ry. Some of stock had been sold by petitioner or his dept. used rent & wages as above taken back for purchase price. None of my goods now on hand.

This was a petition, under St. 1838, c. 163, § 18, for the interposition of the Court, as a court of chancery, in behalf of a creditor of two insolvent partners. The petitioner alleged that Horace Wright and Benjamin B. Hoxse, tanners, and partners in business, applied to the Judge of Probate for the County of Hampshire, in December, 1846, for the benefit of the insolvent laws, and that such proceedings were had, upon their application, that all their estate was assigned to the defendant, as assignee: That the petitioner, in July, 1839, sold and delivered to said Wright & Hoxse, hides, skins and bark, for the sum of \$2374.34, on credit, and took their promissory note therefor, payable in four months, with annual interest, and also took a mortgage of said property, and of other property, which mortgage was duly recorded, and by which they secured to the plaintiff whatever hides, skins, bark or stock, which might afterwards belong to them, wherever situated, and whether manufactured or not, and whether at market or not, or the proceeds of the same, if sold, and also all leather thereafter manufactured from the proceeds of the property then on hand, and in whatever shape it might afterwards exist, or whatever form it might assume, so that the then present and future earnings of the said Wright & Hoxse's tan works, both stock and proceeds, and whether sold or unsold, might stand conveyed, pledged and hypothecated to the petitioner, for the payment of said purchase money and note: That said note and mortgage had never been satisfied, discharged or cancelled, and that their validity had been repeatedly recognized and confirmed by said Wright & Hoxse, by the payment, and indorsement on the note, of the annual interest thereby secured: That the petitioner, at the first meeting of the creditors of said Wright & Hoxse, presented a petition to said judge of probate, setting forth the facts above mentioned, and also stating that the property intended to be secured by the mortgage aforesaid had been taken by the messenger, under the warrant issued according to the provisions of the insolvent laws, and praying that said

Disting. eq. mtge of present prop. on grd that
it is in existence. Seems dif. of fact but
not in principle. Suppose title descent
pass at time of cont. for sale does that
prevent its passing when goods become
specific, price pd, etc? Equity cd well
hold like vice that Contract attaches
when goods become come into exist-
ence & into mtg's ownership.

property might be sold, and the proceeds thereof applied to the payment of said note, and that he might be admitted as a creditor for the residue, if any; referring to the schedules and return of the messenger for a description of the property to be sold; but that said judge of probate "did order and decree that the prayer of said petition should not be granted." That a large amount of the property intended to be conveyed and hypothecated, as aforesaid, was taken by said messenger, and afterwards by the defendant, as assignee, in behalf of the general creditors of said Wright & Hoxse: That although, in the course of the business of said Wright & Hoxse, the identical property which was sold and delivered to them, as aforesaid, by the petitioner, was changed into other forms, yet the proceeds thereof were so used and invested as to assume the form of and become the property thus taken by said messenger and the defendant; that said property, thus taken and held by force of said mortgage, was a portion of the property and earnings of Wright & Hoxse's tan works, and was described in said mortgage, and therein pledged and hypothecated to the petitioner; and that said Wright and Hoxse continued their business as tanners until said warrant issued.

The petitioner's *prayer* was, that the property aforesaid, taken by the defendant, as assignee, or the proceeds thereof, might be applied towards the payment of said note, and that he might be admitted as a creditor, for the residue thereof, if any, according to the provisions of St. 1838, c. 163, § 3; and that such other order or decree might be made in the premises, as law and justice might require.

The answer of the respondent averred, that all the property belonging to the said Wright & Hoxse, at the date of said note and mortgage, was afterwards, from time to time, disposed of by them, at their pleasure, and that at no time between the date of said mortgage and the taking of their property by the defendant, as assignee, did they ever set apart to the petitioner any specific portion of their property, which might have been purchased, if any was so purchased, with the proceeds of the property included in said mortgage; nor did they ever account to the petitioner, specifically, for the proceeds of the same, or any part thereof; nor did they, in the purchase and acquisition of stock, or other property which might have belonged or come to them, after the date of said mortgage, make any distinction between such, if any, as was purchased or acquired with the specific proceeds of the property belonging to them when said mortgage was executed, and that which was the proper fruit of their own personal labor, money and income, or which accrued to them from any other source than the sale of said hypothecated property. Wherefore the respondent prayed that the decree of the Judge of Probate might be affirmed.

The arguments in this case were submitted in writing.

Huntington for the petitioner.

Delano for the respondent.

DEWEY, J. The positions taken by the opposing counsel have been fully and ably presented, in their respective arguments, but, in the view we have taken of the case, it has become unnecessary to express any opinion upon several of the points raised. We have directed our attention more particularly to one, which is a leading and material one, and decisive of the case.

The instrument offered in evidence by the petitioner, as the foundation of his claim, purports to convey to him certain articles of personal property, consisting of hides, skins and bark, all then in existence, and in possession of the grantors, and also whatever hides, skins, bark or stock, of whatever description, that may hereafter belong to the grantors, wherever situated, and whether manufactured or not, and at market or not, or the proceeds if sold; also, all leather thereafter manufactured from the proceeds of property then on hand, and in whatever shape the property might thereafter exist, or whatever form it might assume; so that the then present and future property and earnings of the tan works might stand conveyed, pledged and hypothecated to the petitioner.

This instrument, so far as it purports to mortgage the property of the mortgagors then in existence, and held by them, was in all respects a valid instrument; and if any such property now remains for it to operate upon, it will be effectual to pass the same to the petitioner. We understand, however, that the case shows no such property in the hands of the assignee, and that the specific property conveyed by the petitioner to Wright & Hoxse, and by them reconveyed in mortgage to him, has no longer any existence, and that the only ground of sustaining this petition is that of a lien upon subsequently acquired property, which had no existence at the time of the execution of the mortgage, and which has no other connection with it, than that, to some extent, it may have been purchased with funds which were the proceeds of various sales from the tannery; first, of the articles purchased, and their proceeds applied to the purchase of new stock, which, when manufactured, was again sold, and its proceeds invested; and so from time to time. This instrument is clearly, therefore, an attempt to mortgage or hypothecate after acquired property. Can such security be made effectual by the making and recording of such instrument, without any further act of the parties, with no delivery by the mortgagor, and no act on the part of the mortgagee, taking possession or exercising any rights of property in the newly acquired articles, by virtue of the provisions in the mortgage as to property?

This subject has been recently before us, in the case of *Jones v. Richardson*, 10 Met. 481, involving the question as to the validity of such a mortgage in a court of law. The subject was very maturely considered, and the Court were all clearly of opinion that such mortgage did not pass after acquired property. It was stated, in that case, as an elementary principle, that "a person cannot grant or mortgage property of which he is not possessed, and to which he has no title." All the qualification introduced was, that one may grant personal property of which he is potentially, though not actually, possessed, as in the case of the grant of all the wool that shall grow on the sheep he owns at the time of the grant, but not wool which shall grow on sheep which are not his. but which he may afterwards buy.

In our opinion these principles as to conveyance of property are equally sound and equally to be enforced, whether the question as to the right of property is raised in a court of law or of equity. The parties appear before us, each claiming the property by conveyance; the petitioner by the instrument already recited, and the defendant as assignee, holding by virtue of a deed from a master in chancery, for the benefit of all the creditors of Wright & Hoxse. Whether it would really be more equitable, in a case like the present, that the after acquired property should be holden by the one party or the other; whether the claims of the individual creditor would, in an equitable view, be more meritorious than those of the entire body of creditors, seeking a distribution *pro rata*, would depend, not so much on anything disclosed on the face of the mortgage, as upon a full knowledge of the entire course of business of the mortgagor, and the circumstances appertaining to the property which is now the subject of controversy, the mode of its acquisition, &c.

Supposing ourselves clothed with full equity powers, and treating this case as before us unembarrassed by any question as to our limited jurisdiction in chancery, we are not satisfied that the petitioner has shown any such title to this property as would authorize us to hold it to be subject to a lien for the note of Wright & Hoxse to the petitioner, as against creditors who have acquired a right to it before any act of the petitioner had taken place, reducing the property to his possession, or by asserting effectually any right under the prospective hypothecation, as by making a claim and taking possession under it, while in the possession of Wright & Hoxse. There are doubtless equitable liens which may be enforced in courts of equity, though not available in a court of law. Many such might be enumerated. That which nearest approaches the present case is that of an agreement to convey property, or do some act, the performance of which has been casually postponed;

→ and in dealing with the rights of the parties in such case, a court of equity will consider a thing done which was agreed to be done. That class of cases does not present, however, the difficulties that arise in the present case. The property which is the subject of the agreement, in the case supposed, was in existence, and the power to convey the same, or stipulate for a conveyance, existed.

Nor do the cases of *Davis v. Newton*, 6 Met. 537, and *Eastman v. Foster*, 8 Met. 19, at all conflict with the view we have taken of the present case. The property, in reference to which those cases presented questions, was in existence, was susceptible of being conveyed and was the subject of bargain and sale. In the case *Eastman v. Foster*, more particularly relied upon, the mortgage was a good and valid mortgage in law, and of property then in existence, and the party only went into equity to enforce a claim arising under such valid mortgage. The case was one of implied trust, of which this Court has jurisdiction, and which it may well enforce.

The difficulty that presses in the present case is the want of any binding original contract, which *per se* could have force and effect to change the after acquired property, without some further act by the parties, after the property should have come into existence. Such act we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story in the case of *Mitchell v. Winslow*, 2 Story, R. 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity.¹ In relation to that case, it is supposed by the counsel for the petitioner, that it had, to some extent, the sanction of this Court, in the remarks of the judge who delivered the opinion in the case of *Jones v. Richardson*. But we apprehend that no such view was intended to be suggested. The case then before the Court was an action at law; and the obvious and quite sufficient answer to the case of *Mitchell v. Winslow* which was relied upon by the then plaintiffs, was "that was a case in equity," without entering upon the further inquiry whether we should, as a court of equity, in a

Good. ¹ "It seems to me a clear result of all the authorities that wherever the parties by their contract intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy."—*Per* Story, J., in *Mitchell v. Winslow*, 2 Story, 630, 644 (1843).

case before us, come to the same result. The case of *Langton v. Horton*, 1 Hare, 549, much relied upon as sanctioning the doctrine that such conveyance might be supported in a court of equity, seems to us to go no further than this, viz., that there having been such a contract between the parties as would in equity have given the plaintiff a title to the cargo when it arrived, and that contract having been perfected by possession lawfully taken, it being a case of property mortgaged while at sea, and it being sufficient to take possession forthwith on its arrival, the plaintiffs were entitled to hold under this contract as against a judgment creditor. On the other hand, another adjudication may be referred to as strongly sustaining the view we take of the invalidity of this mortgage in equity. I allude to the case of *Mogg v. Baker*, 3 M. & W. 195, in the Court of Exchequer. As I understand that case, the doctrine that a lien may be enforced in equity, in a case like the present, is wholly repudiated. The Court held that an agreement to mortgage certain specific furniture then in existence would constitute an equitable title in the party holding such agreement, and prevent its passing to the assignees of the insolvent; but if it was only an agreement to mortgage the furniture to be subsequently acquired, then it would confer no right in equity. It is true, as was remarked by the counsel for the petitioner, that the Court were dealing there with the equity principle of construing that to have been done which was agreed to be done; but no question arose as to the correctness of that principle of equity, and the only point of controversy was, whether, taking that to have been done which was agreed to be done, it would constitute a valid, equitable lien. And whether it would do so or not, was made to depend upon the fact whether the property was subsequently acquired; and, if so, it was held that the agreement would confer no right in equity. The doctrine of that case, which seems fully to sanction the principle we have adopted in the present case, was affirmed by the Court of Queen's Bench, in *Gale v. Burnell*, 7 A. & E., N. R. 850.

The result to which we have come, upon the present petition, may be stated in the following propositions: The petitioner cannot hold the property in controversy, as mortgaged property, because it was not in existence, and, therefore, not capable of being conveyed in mortgage, at the time when the mortgage was made. The instrument could not operate to pass the property as a pledge, because the custody of the same was not taken and retained by the pledgee. The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement without being accompanied by possession or delivery of the property. A stipulation that future acquired property shall be holden as security for some present engagement, is an executory agreement, of

such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that, such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such a case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage, as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost, and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally.

There was no act done by the petitioner and by Wright & Hoxse jointly, or by either of the parties, which was sufficient to give effect to the original mortgage, as to the after acquired property. The recording of the mortgage by the petitioner did not; for that was before such property was acquired. The annual payment of interest by Wright & Hoxse could have no such effect. It was neither actually nor symbolically accepting the transfer or conveyance of the articles after they were acquired by Wright & Hoxse.

As to the point suggested, that this agreement between these parties might be treated as a conditional sale by the petitioner, the change of property to take effect only on payment of the note, it was competent for the petitioner to have made such a conditional sale, and the effect of such sale would have been, that he would not have been divested of the property in the articles thus conditionally sold. But no such principle can avail the petitioner here, as no articles remain in existence that were his property and possessed by him at the time of the sale. The petitioner seeks not to reclaim such articles, but those subsequently acquired by his debtors. Nor is there any ground for the suggestion that this may be treated as the constitution of an agency on the part of Wright & Hoxse, and that, as such agents, all their acquisitions would enure to the petitioner as the principal until the note of Wright & Hoxse was fully paid.

In no way, that we perceive, can we give effect to this contract,

so as to give the petitioner the lien, upon the after acquired property, that he seeks to establish.

Petition dismissed with costs.¹

omit.

SMITHURST v. EDMUNDS.

COURT OF CHANCERY OF NEW JERSEY, 1862.

(14 N. J. Eq. 408.)

44

*Holds a
type of future
prop. good
against judg-
ment cred.
without prov.
by mortgage.
mtgor taking
inc. relief
as = to
judg taking
ing for.*

This was a motion to dissolve an injunction, under circumstances which are fully stated in the opinion of the Chancellor.

THE CHANCELLOR. The complainant, being the owner of the Columbia House hotel, at Cape Island, with its appurtenances, and of the furniture therein, and being in possession of the premises, by an indenture bearing date on the seventh of June, 1860, leased the real estate to James H. Laird, for the term of three years from the first of May, 1860, at the yearly rental of \$5000, payable in equal installments, on the fifteenth day of July and thirty-first day of August in each year, and sold and transferred to the lessee, the furniture and other household articles for the sum of \$5563.42. Laird, as the lessee, as a collateral security for the punctual payment of the rent, resold and retransferred to the lessor all of said furniture and other household articles, and also sold, assigned and transferred and covenanted and agreed to sell, assign and transfer all other articles of furniture which the lessee should purchase and place, or cause to be purchased and placed upon said demised premises during the said term, it being then known to and contemplated by said parties that it would be necessary for the lessee to purchase and place a large amount of furniture on said premises, in addition to that which was then there, and it being the agreement and intention of said parties that when and so often as any additional furniture should be purchased and placed on the premises by the lessee, it should be deemed and considered as belonging to the complainant as collateral security for the payment of said rent. And the lessee, among other things, covenanted and agreed with the lessor that the said furniture and other household articles, as well as that which then was on said premises as that which should thereafter be placed thereon by the lessee, should not be sold or otherwise disposed of, or removed from said premises during

¹ Followed, *Low v. Pew*, 108 Mass. 347 (1871); *Chynoweth v. Tenney*, 10 Wis. 397 (1860). But see *Chase v. Denny*, 130 Mass. 566 (1881).

In Chase v. Denny mtgor took for. before insolvency proceedings but after insolvency as mtgor knew. Held for mtgor. not a preference as had authority to take for. prior to know. ledge of insolvency.

the term, but should remain thereon, as the property of the complainant, as collateral security for the payment of said rent.

The bill charges that, in pursuance of the lease, the lessee entered upon the possession and enjoyment of the premises, and that large arrears of rent are due to the complainant; that after the execution of the lease, the lessee, as had been contemplated, purchased and placed on the demised premises a large amount of furniture, of the value of about \$5000, in addition to that purchased of the complainant, which still remains thereon. The complainant insists that, by virtue of his contract with the lessee, all the said furniture belongs to him as collateral security for the payment of rent, and that it cannot lawfully be sold or removed from the said premises by the said lessee, or by virtue of any process or proceedings against him.

The bill further charges, that sundry judgments at law have been recovered against the lessee, and that, by virtue of executions issued thereon, the sheriff of the County of Cape May has levied upon the said furniture on the demised premises, and advertised the same for sale. The bill prays that an injunction may be issued to restrain the sheriff from selling the said furniture, or any part thereof, and from removing the same from the demised premises. An injunction issued pursuant to the prayer of the bill. The defendant now moves to dissolve the injunction for want of equity in the bill.

The question at issue turns upon the validity and effect of the contract between the complainant and Laird relative to the furniture and other household articles specified in the agreement. As to so much of the furniture as was sold by the complainant to Laird, and which was upon the premises at the date of the lease, the validity of the contract is not called in question. But in regard to that part of the furniture which was not at the time owned by the lessee, but which it was then contemplated should thereafter be purchased and placed upon the premises, it is insisted that the contract is invalid and inoperative (2 Story's Eq. Jur., § 875; 1 Eden on Inj., Waterman, 15 p. note). . . .

To authorize the interference of the Court, the complainant must show by his bill the existence of a right, legal or equitable, and the danger of the deprivation of that right. No fraud is imputed to the parties in the making of the agreement. It must be assumed that the contract was made in good faith and for the purpose of securing a *bona fide* debt thereafter to grow due.

The objection is, that a valid sale or transfer cannot be made of chattels which at the time of the contract are not owned by the vendor, and have no actual or potential existence. It is clear that, if valid at all, the contract must be valid as a chattel mortgage.

It is not a pledge. These chattels were not delivered, and they were not capable of delivery at the time of the contract. They had no existence. At the common law, there cannot be a technical pledge of property not then in existence or to be acquired by the pledgor *in futuro* (Story on Bailments, §§ 286, 294).

It is equally clear that the contract cannot operate as a legal sale or mortgage of the chattels. To constitute a valid sale at law, the vendor must have a present property, either actual or potential, in the thing sold (*Grantham v. Hawley*, Hobart's R. 132; Co. Lit. 265, a, note 1; *Robinson v. Macdonnell*, 5 Maule & S. 228; 2 Kent's Com. 468; 1 Parsons on Cont. 437; Story on Sales, §§ 185, 186).

It is not necessary that the vendor should have the actual property, or that the chattels should have an actual existence. It is enough that he have it potentially. The distinction was taken in the early case of *Grantham v. Hawley*, already referred to. The lessor in that case covenanted that the lessee of a term might take the corn that should be growing at the end of the term. It was held that the words were good to transfer the property as soon as it was extant, the lessor of the land having the crops not actually, but potentially. So it was said, a parson may grant all the tithes of wool that he may have in a certain year. But a man cannot grant all the wool that shall grow upon his sheep that he shall hereafter buy, for there he hath it neither actually nor potentially. The distinction will be found recognized in most of the leading cases, and fully stated by the elementary writers already cited.

In this case the lessee had neither actual nor potential property in the chattels mortgaged. They were articles which it was contemplated should be thereafter purchased by the lessee, and the agreement is, that when and so often as any additional furniture shall be purchased and placed on the premises by the lessee, it shall belong to the lessor as collateral security for the payment of rent, and shall not be sold or otherwise disposed of or removed from the premises during the term. It will be assumed, as the authorities clearly establish, that the agreement does not constitute a valid transfer or mortgage at law of the after acquired chattels. The real question is, whether the contract creates an equitable mortgage of the chattels which a court of equity will enforce and protect as against a subsequent execution creditor.

In the case of *Langton v. Horton*, 1 Hare, 549, this question was carefully examined and decided by Vice-Chancellor Wigram. The owner of a whaling ship, then on her voyage to the South Seas, in order to secure to the assignees certain indebtedness for advances, assigned the ship, with her appurtenances, and also all oil and head matter and other cargo which might be caught and

brought home in the said ship on and from her then present voyage. It was held that the assignment was, as against the assignor, a valid assignment in equity, as well of the future cargo to be taken during the particular voyage as of the cargo, if any, which existed at the time of the assignment; and the master, having delivered up possession of the ship and cargo to the mortgagees immediately upon his return from the voyage, it was further held, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterward sued out a writ of *fiery facias*, and proceeded to take the ship and cargo in execution. It may be suggested that the owner of the ship might be deemed to have a potential ownership in the whales to be thereafter caught during that particular voyage, and that upon this ground the assignment might be held valid at law. It was held otherwise, and a similar assignment was declared to be invalid at law by Lord Ellenborough, in *Robinson v. Macdonnell*, 5 Maule & Sel. 228. But if by any latitude of interpretation that view might be taken, it manifestly did not influence the result of the cause.

In the course of his opinion, the Vice-Chancellor says: "I lay out of the view all questions as to the operation of the instrument at law, and look at the case only as a question in equity." And again he says: "I rely in this case on the general principle, that there having been such a contract as would in equity entitle the plaintiffs, as against the owner, to the cargo when it arrived, and the title under that contract having been perfected by a possession lawfully taken under the deed, which there is no attempt on the part of the owner to impeach, the subsequent judgment creditor cannot take that property from the plaintiffs." It may be again suggested that there is this further dissimilarity between the cases. In the reported case, the ship and cargo, on her return from the voyage, was delivered to the mortgagees, and thus the equitable title of the mortgagees was perfected; whereas in the present case the chattels were not delivered to the mortgagee, but remained in the possession of the mortgagor. It is true the chattels were not in the actual possession of the lessor, but they were delivered to the lessee upon the demised premises, where, in accordance with the contemplation of the parties and the terms of the agreement, they were to be used by the tenant, and from which they were not to be removed during the continuance of the term. This in no wise affected the validity of the contract, but was a delivery according to the terms and spirit of the contract, which perfected the equitable title of the mortgagee. In this regard there is no real dissimilarity between the cases.

In the more recent case of *Mitchell v. Winslow*, 2 Story's R.

630, this question underwent a more elaborate examination, by Mr. Justice Story, in the Circuit Court of the United States. The Court held that to make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment. But the courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only. . . .

In the course of a very elaborate opinion, after quoting at some length from the opinion of the Vice-Chancellor in *Langton v. Horton*, Judge Story said: "Now it seems to me that this reasoning is exceedingly cogent and striking, and it stands upon grounds entirely satisfactory and conclusive upon the whole subject." And as the result of his investigation, he adds: "It seems to me the clear result of all the authorities, that wherever the parties by their contract intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy." These cases, I think, in principle clearly control the present case, and I am quite satisfied to rest my conclusion upon their authority. It would be difficult, indeed, upon a question of equity, to cite higher authority, upon either side of the Atlantic, than the eminent judges whose opinions have been referred to.

A further question occurs, viz., whether, admitting the equitable mortgage to be valid against the mortgagor, and all persons claiming under him with notice, it will be enforced against a subsequent judgment creditor of the mortgagor. It was so held by Vice-Chancellor Wigram in the case of *Langton v. Horton*, already cited. The subject afterwards underwent a more elaborate examination by the same learned judge, in the case of *Whitworth v. Gaugain*, 3 Hare, 416, where the grounds of his conclusion are clearly and convincingly stated. . . .

The motion to dissolve the injunction is denied with costs.

LOOKER v. PECKWELL.

SUPREME COURT OF NEW JERSEY, 1876.

(38 N. J. Law, 253.)

In replevin. On error to the Essex Circuit.

The opinion of the Court was delivered by

VAN SYCKEL, J. This cause was tried in the Essex County Circuit Court, by consent of parties, before the Court without a jury, upon admitted facts. A brief statement will present the point in issue. One John M. Mackenzie, to secure his debt to the plaintiff, executed to him a mortgage upon the fixtures, stock and materials, &c., of his bakery in Newark, described therein as follows: "All the bake-house fixtures and utensils now being in and about my bakery, No. 413 Broad street; also, all flour, &c., and all other stock manufactured, and unmanufactured, and all materials whatsoever being in and about said bakery, or that may at any time during the continuance of this mortgage be purchased and obtained to replenish and replace the same or any part thereof, together with," &c.

The mortgage was duly registered, as required by law. After the delivery of the mortgage, Mackenzie, in order to replenish his stock, purchased twenty barrels of flour, which were delivered to him on the sidewalk in front of his bakery, where they were seized by the defendant as sheriff, by virtue of an execution in his hands, upon a judgment in favor of Totten against said Mackenzie, for goods sold to him after the making and registering of the mortgage, and before the purchase of said twenty barrels of flour, which were purchased of other parties. The question submitted on the case is, whether the twenty barrels of flour were subject to the lien of the mortgage?

Perkins, tit. Grants, § 65, says: "It is a common learning in the law, that a man cannot grant or charge that which he hath not." A grant will operate only upon goods which the grantor has actually or potentially at the time of the grant.

Chief Justice Tindall fully recognized this rule in *Lunn v. Thornton*, 1 Com. Bench, 379, which has since been received as authority both in England and this country, as applicable to sales as well as to mortgages.

The suggestion of Chief Justice Tindall, that the grant might be so framed as to give the grantee a right between themselves to seize after-acquired goods of the grantor, was acted upon in *Congreve v. Evetts*, 10 Exch. 298; *Hope v. Hayley*, 5 Ellis & B. 830,

48
omit
At law, one
can only sell
goods actually
or potentially
in his poss.

and in other cases cited below, but the doctrine held in the principal case has not been shaken; on the contrary, it is in a mass of cases declared to be settled, if not elementary law (*Gale v. Burnell*, 7 Q. B. 850; *Chidell v. Galsworthy*, 6 C. B. [N. S.] 471; *Jones v. Richardson*, 10 Metc. 481; *Barnard v. Eaton*, 2 Cush. 294; *Rice v. Stone*, 1 Allen, 566; *Low v. Pew*, 108 Mass. 347; *Van Hoozer v. Cory*, 34 Barb. 9; and many other cases cited in Benjamin on Sales, § 79, note k).

That this is the rule at law, is regarded by Chancellor Green in *Smithurst v. Edmunds*, 1 McCarter, 408, as beyond controversy. He says that to constitute a valid legal sale, the vendor must have a present property, either actual or potential, in the thing sold.

The judgment of the Court below in favor of the defendant was right, and should be affirmed.

BRETT v. CARTER.

DISTRICT COURT OF THE UNITED STATES, 1875.

(2 *Lowell*, 458.)

But the note is not a bill in equity by the assignee in bankruptcy of one Osborne N. Sargent, against a mortgagee of the stock of stationery and other similar goods. It appeared that Sargent bought out the stock in trade of the defendant Carter, as carried on by him at a certain place, in November, 1874, and on the same day he gave back a mortgage to secure the payment of the purchase money by installments, represented by promissory notes extending over a period of four years. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." Among the covenants was one, that, if the stock should be diminished "faster than said sum hereby secured is paid, said grantor is to furnish further security for said sum, whenever required by said grantee."

Two of the notes were duly paid, but one that came due in November, 1875, was not paid in full, and the defendant demanded further security, and a mortgage was given of such stock as had been acquired during the year. This mortgage was given about two weeks before the petition in bankruptcy was filed, and the theory of the bill was that it was a preference. The complainants afterwards asked leave to amend, and allege the first mortgage to

omit. 49

be void, on the ground that the mortgagor was tacitly permitted to sell the goods in the ordinary course of his trade.

The defendant insisted that both mortgages were valid.

LOWELL, J. The Court of Appeals of New York decided, by a bench which was equally divided in opinion, that a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face, as mere matter of law (*Griswold v. Sheldon*, 4 Comstock, 581). This decision has had a remarkable following, and its doctrine appears to have become the settled law of New York, Ohio and Illinois. It is not the law of England, Maine, Massachusetts, Michigan, or Iowa. In several States it has not been passed upon. But as this new doctrine, or, rather, revival of an old one, has been said by Mr. Justice Davis, of the Supreme Court, to be so general and just that it may be presumed to be the law of Indiana, in the absence of express and unambiguous decisions of the courts of that State to the contrary, and as I venture to doubt both the generality and the justice of the doctrine, it becomes me, with all the respect I feel for that opinion, to state my reasons for not acceding to it. If the rule, whichever way it may be, were a settled rule of property in Massachusetts, inquiry into its history or justice would be unnecessary; but although I have no doubt my decision will accord with the law of Massachusetts, I have not found a case in this State in which the decisions in New York were reviewed, and it is possibly still a question for discussion.

I had supposed it to be well settled, after much debate and conflict of opinion, certainly, but substantially settled, that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on *Voluntary and Fraudulent Conveyances*, p. 126, and by the cases he cites, and by the learned editors, both English and American, of *Smith's Leading Cases*, notes to *Twyne's Case*, Vol. I., p. 1, &c. By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, first, such as are expressly made so by statute; as, for instance, when a bankrupt retains the order and disposition of goods, as apparent owner, with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court, *Sawyer v. Turpin*, 91 U. S. (1 Otto) 114, 121; or, second, Where the act is necessarily a fraud on creditors, as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole

of it to one antecedent creditor. These, to be sure, are examples, but very few others could be adduced, and I understand the true law both here and in England to have been, until lately, that a conveyance for valuable present consideration is never a fraud in law on the face of the deed, and, if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor.

It is very strange that after our Legislatures have met the difficulty in *Twyne's Case*, by requiring registration, which gives not only constructive, but in most cases actual notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited, and others following them, should have reverted to the harsher doctrine which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud.

It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose, for if he cannot sell in the ordinary course of trade, or only as the trustee and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant. I would refer in this connection to the very able opinions of Judge Dillon in *Hughes v. Cory*, 20 Iowa, 399, and of Judge Campbell in *Gay v. Bidwell*, 7 Mich. 519, in which they refuse to follow the decisions in New York, and give reasons for that refusal, which, in my judgment, are unanswerable.

If it be said that this is one of those cases in which fraud is a necessary result of the deed, all I can say is that this brings us to an ultimate fact of observation and experience, and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such a case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given. Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defendant; that the mortgage shows that all the stock, present and future, is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain installments. No offer is made to prove that any one was deceived, or even was ignorant of the mortgage, but I am asked to find fraud in law when I know, and it is admitted, there was none

in fact. Besides cases already cited, see *Briggs v. Parkman*, 2 Met. 258; *Jones v. Huggeford*, 3 *id.* 515; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Mitchell v. Winslow*, 2 Story, 630; *Abbott v. Goodwin*, 20 Maine, 408.

The second point in this case is no less interesting than the first. By the mortgage, the stock that shall be put into the shop by the mortgagor is included in the conveyance. It is undoubtedly the law of courts of equity, as cases presently to be cited will show, that after acquired chattels definitely pointed out, as, for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security. The common law recognizes such transfers of land by way of estoppel, and of chattels when they are the produce of land or of chattels already owned by the transferrer, but not of future chattels *simpliciter*, unless there be some *novus actus interveniens* after the chattels are acquired; that is to say, either some new transfer, or possession taken under the old. It may be cause of regret that the law should be different in the courts of common law and equity, but this is of no importance in bankruptcy, because it has been the law for a great while that an assignee in bankruptcy takes only the beneficial interest of the bankrupt; and the courts of law have admitted equitable defences, such as equitable liens, &c., to be set up in such cases, years before they had power by statute or usage to admit equitable pleas in ordinary controversies; and it was every day's practice to find these courts passing upon equitable titles in behalf of a defendant, which they professed to know nothing about, and certainly could not deal with, if relied on by a plaintiff. Such was and is the law, and a very just law, as far as it goes.

But granting the rule in equity to be that after-acquired chattels may be mortgaged, the point that has given me most difficulty is whether such is the law of Massachusetts. I suppose that the Federal courts, in all matters of title to property, whether real or personal, when there is no question of commercial or maritime or general law, and none of the conflict of laws, are as much bound in equity as at common law by the jurisprudence of the State in which they sit. Or, in other words, I understand that the thirty-fourth section of the judiciary act, making the laws of the State the rule in actions at common law, is declaratory only, and that on both sides of this Court I am bound to follow the law of Massachusetts in the local questions, and the general law in general questions.

Now, the only decision I can find in equity in this State upon this subject certainly decides very distinctly that even in equity a mortgage of after-acquired chattels is invalid (*Moody v. Wright*, 13 Met. 17). In that case the Court refused to follow the then re-

cent decision of Story, J., in *Mitchell v. Winslow*, 2 Story, 630, and relied largely on the dictum of a very distinguished judge, Baron Parke, who said, in *Mogg v. Baker*, 3 M. & W. 195, that there was no such lien in equity. Some years after these decisions were rendered the House of Lords unanimously followed the doctrine of Judge Story, and reversed a decision of Lord Campbell, which had been founded on the dictum already referred to, and Baron Parke concurred in the reversal (*Holroyd v. Marshall*, 10 H. of L. 191). This was not a new doctrine in courts of equity. (See *Curtis v. Auber*, 1 Jac. & W. 532; *Re Ship Warre*, 8 Price, 269; *Langton v. Horton*, 1 Hare, 549; *Douglas v. Russell*, 4 Sim. 524; 1 Myl. & K. 428; *Re Howe*, 1 Paige, 129.)

These cases have been repeatedly followed in England, and even more often in this country, and, so far as I am aware, with not a single decision the other way of late years. It is true that a great many of the cases arose upon mortgages given by railroad companies, and some few judges have founded a distinction upon that circumstance. But there is no difference in principle between the mortgage by such a corporation of its rolling stock not yet *in esse* and that by a trader of his future stock in trade in a particular shop. The truth merely is, that from the nature of the former, the large sums which they deal with, and the time at which they must be negotiated, which is before the road is finished, attention was called to the great injustice that would be done in displacing the first mortgage in favor either of general creditors or even of subsequent mortgagees; but similar injustice will be done in all such cases to the extent of the value involved. The following are some of these decisions: *Holroyd v. Marshall*, 10 H. of L. 191; *Pennock v. Coe*, 23 How, 117; *Morrill v. Noyes*, 56 Maine, 458; *Pierce v. Emery*, 32 N. H. 484; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Phila. &c. Co. v. Woelpper*, 64 Penn. St. (14 Smith) 366; *Phillips v. Winslow*, 18 B. Mon. 431; *Sillers v. Lester*, 48 Miss. 513; *Pierce v. Mil. R. R. Co.*, 24 Wis. 551.

Considering the decision of Judge Story in this circuit, and the reasons given by the Court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's dictum, I am not prepared to say, that if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it, and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid.

I am of the opinion that the mortgage of 1874 created a valid

lien in behalf of the defendant upon the stock of goods in the shop at the time of the bankruptcy, and that the mortgage of 1875 does not vitiate this lien. The fixtures, however, which were not mentioned in the first mortgage, cannot be held by the second, because that was given after the bankrupt had become insolvent, to the knowledge of the defendant.¹

Decree accordingly.

omit.

KRIBBS v. ALFORD.

COURT OF APPEALS OF NEW YORK, 1890.

(120 N. Y. 519.)

54

Mtg. of after acquired prop. good in equity without further set against purchase with notice.

Of mtge. comes prop. afterwards put in certain places and mtgs. etc. place and under prop. there, it is not covered by mtgs.

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of June, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee. The nature of the action and the facts are sufficiently stated in the opinion.

PARKER, J. On the 15th day of May, 1880, one Johnson, then being the owner in fee of certain lands, executed and delivered to Thomas Argue an instrument in writing (which for convenience will hereafter be termed a lease), which conferred upon the latter the exclusive right to produce oil and gas from said land for a period of twelve years. For that purpose it permitted him to go upon the land and make necessary erections; but as to any other use Johnson reserved the possession and right of enjoyment. It gave to Argue the right to remove any and all tools, boilers, engines and machinery; also the casing to the wells and drive-pipe, if Johnson should refuse to pay a fair price therefor.

Pursuant to the terms of the lease Argue and his assignees placed upon the property engines, boilers and other machinery necessary to carry on the operations for which the lease provided, and in view of the intent of the parties as manifested by the terms of the lease and otherwise, these articles retained their character of personalty after annexation (*Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 *id.* 28; *Hoyle v. P. & M. R. R. Co.*, 54 *id.* 314, 324; *McRea v. C. N. Bank*, 66 *id.* 489-495).

In October, 1880, Argue assigned his interest in the lease to Albert Garrett and Adam Prentice. Thereafter Adam Prentice, to

¹ *Scharfenburg v. Bishop*, 35 Ia. 60 (1872), accord. This is the prevailing view. The contrary opinion, which formerly prevailed in Illinois (*Hunt v. Bullock*, 23 Ill. 320 [1860]; *Palmer v. Forbes*, *id.* 301) seems to have been dissipated. *Borden v. Croak*, 131 Ill. 68 (1889).

secure the payment of \$950.50, executed and delivered to the plaintiff a mortgage on his undivided interest in the lease and upon all "his interest in the oil wells now thereon and to be by him placed thereon, with all his interest in the structures, fixtures, equipments and appurtenances now on said lease or hereafter to be placed thereon." On the 10th of January, 1881, a copy of the mortgage was filed in the Town Clerk's office, and thereafter it was duly refiled. Subsequently, and on the 24th day of August, 1882, Garrett and Prentice sold and assigned all their rights and interests under the lease to the defendants Alford and Curtis, who thereafter finished one well, put down two others, and added largely to the plant by way of engines, boilers and other machinery.

And the substantial question presented by this appeal is, whether the tubings, casings, engines, boilers, shafting and other machinery purchased and placed upon the property after the giving of the mortgage are embraced within it. True, the appellant contends that his title to the chattels is not burdened with the plaintiff's mortgage, because, as he alleges, Alford and Curtis purchased in good faith and without notice; but this claim is not well founded, for while a search, which failed to disclose the existence of a mortgage, was timely made in the Town Clerk's office, the referee has found upon sufficient evidence to support it, that the mortgage was filed as a chattel mortgage in the proper Town Clerk's office, and within thirty days of the expiration of the year thereafter it was refiled with the statement required by statute. Alford and Curtis are, therefore, chargeable with constructive notice, and the lien of the plaintiff is not affected by their failure to find the mortgage.

In some jurisdictions validity is denied to a contract in so far as it purports to embrace property to be acquired after date. The reason assigned for this holding is tersely stated in Perkins (sec. 65): "It is a common learning in the law that a man cannot grant or charge that which he hath not." In others it is held to be invalid in law and yet operative in equity. Unexplained, this seems to be a solecism, and results from a use of language which fails to accurately convey the idea intended. Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party. Such we deem the rule to be in equity in this State (*McCaffrey v. Woodin*, 65

N. Y. 459; *Wisner v. Ocumpaugh*, 71 *id.* 113; *Coats v. Donnell*, 94 *id.* 168-177).

As between the mortgagor, or his assignee, and the mortgagee, therefore, the chattel mortgage operated to create a lien in equity as to the chattels purchased and placed upon the property by the mortgagor subsequent to its date. This lien the trial court rightly enforced by its judgment. But it went further and declared, in effect, that the lien attached to the personalty placed upon the property by the assignees of the mortgagor as well. This, we think, was error. The assignees did not contract that the machinery to be placed upon the property by them should be subject to the provisions of the mortgage. They did not assume or agree to pay the mortgage or carry out its provisions. Indeed, the assignment contained no condition or covenant whatsoever, and the assignees did not even know of the existence of the mortgage. Their acceptance of the lease bound them to fulfill the covenants running with the land (113 Penn St. 83; *Spencer's Case*, 1 Smith's L. C. 145). But it did not, in addition, burden them with the obligation to make good the personal covenants given by the lessee to third parties as security for an indebtedness, because they had constructive notice of the existence of the mortgage the lien of plaintiff can be enforced, and the defendants deprived of the machinery on the premises at the time of the purchase by them of the lease. But the lien provided for by the instrument could in any event only extend to property thereafter acquired by the mortgagor. It could not attach to chattels to which the mortgagor has not acquired either title or possession. Indeed, it does not, by its terms, purport to embrace any other after-acquired property than that placed thereon by the mortgagor.

It follows, from the views expressed, that the judgment should be reversed and a new trial granted, with costs of this court to the appellant, unless, within thirty days, the plaintiff stipulate to modify the judgment by excepting therefrom the articles placed on the property after the assignment to Alford and Curtis, and described in Schedule D., in which event the judgment as modified is affirmed, with costs to the appellant.

All concur except Bradley and Haight, JJ., not sitting.

Judgment accordingly.

omit.

THE ROCHESTER DISTILLING CO. v. RASEY.

COURT OF APPEALS OF NEW YORK, 1894.

(142 N. Y. 570.)

57

Mtge. of
after acquiring
prop. not good
vs. judgment
creditor.
Ct. argues
that it is
good as bet.
mortg. and
m. fee.

Appeal from order of the General Term of the Supreme Court in the fifth judicial department, made October 4, 1892, which reversed a judgment in favor of defendant, entered upon a verdict directed by the court, and granted a new trial.

In February, 1890, the plaintiff recovered a judgment against one Lovell for \$147.44. In April, 1890, Lovell, being the lessee of certain farm lands, in order to secure one Page as an accommodation indorser and for the repayment of money borrowed from him, executed and delivered to him a chattel mortgage; which covered "the grass now growing upon the premises leased, etc.; also all the corn, potatoes, oats and beans, which are now sown or planted, or which are hereafter sown or planted during the next year, etc." At the time, but a small part of the land had been planted with potatoes, and the greater part of the planting of potatoes, and all that of the beans, was done in the following month. On July 5th an execution was issued upon plaintiff's judgment, and the sheriff levied upon the growing crops and advertised their sale in August; at which sale plaintiff purchased them. After the levy by the sheriff, Page, the chattel mortgagee, on July 15th foreclosed under his mortgage, gave notice and sold the growing crops to the defendant. Defendant took possession of the property so purchased and this action was brought to recover its possession. The trial judge, being moved by each of the parties for a verdict in his favor, directed it for the plaintiff as to the beans and for the defendant as to the potatoes and ordered the exception taken to that direction to be heard, in the first instance, at the General Term. That court sustained the plaintiff's exception to the ruling of the trial judge and ordered a new trial; but allowed an appeal to this court, on the ground that a question of law was involved which ought to be reviewed.

GRAY, J. I think this case does not, in principle, differ from any other case, where a chattel mortgage has been given upon property in expectancy and which has no potential existence at the time of its execution. The fact that the subject of the mortgage is a crop to be planted and raised in the future upon land does not affect the determination of this question upon established principles. It may be that precisely such a case, in its facts, has not been passed upon in this court; but there are expressions of opin-

ion, in several cases of a kindred nature, in the reports of this court and of other courts in this State, which leave us in no doubt as to the doctrine which should govern. The proposition that a mortgage upon chattels having no actual, nor potential, existence, can operate to charge them with a lien, when they come into existence, as against an attaching, or an execution creditor, has frequently been discountenanced and repudiated. *Grantham v. Hawley*, Hobart, 133, is the general source of authority for the proposition that one may grant what he has only potentially, and there is no good reason for doubting that that which has a potential, or possible existence, like the spontaneous product of the earth, or the increase of that which is in existence, may properly be the subject of sale, or of mortgage. The right to it, when it comes into existence, is regarded as a present vested right. That which is, however, the annual product of labor and of the cultivation of the earth cannot be said to have either an actual, or a potential existence before a planting.

This action being one at law, the inquiry is limited to ascertaining the strictly legal rights of two contending creditors to the property of their debtor, Powell, in the crops which he had raised. It is unlike some of the cases, which have arisen between the lessor of land and his lessee. In such a case, a different principle might operate to create and support the lien of the landlord upon the crops, as they come into existence upon the land. The title to the land being in him, an agreement between him and the lessee for a lien upon the crops to be raised, to secure the payment of the rent, would operate and be given legal effect, as a reservation, at the time, of the title to the product of the land. That was the case of *Andrew v. Newcomb*, 32 N. Y. 417, where the owner of land agreed with another that he might cultivate it at a certain rent; the crop to remain the property of the landlord, until the tenant should give him security for the rent. Judge Denio repudiated the idea that the arrangement could be called a conditional sale of the flax; because the subject was not in existence. He held that the idea of a pledge or of a sale had no application and that the effect of the contract was to give to the landlord the original title to the crop. His remarks upon the subsequent vesting of the title to crops, when they come into being, have reference to such an arrangement between landlord and tenant and not to the case of a mortgage, or conditional sale to some third person of crops yet to be planted. Mr. Thomas, in his work on Chattel Mortgages, upon the subject of mortgaging a crop not yet planted, says (§ 149) "the weight of authority inclines to the view that the lien is an equitable one and differs, in some respects, from the charge created by a mortgage of property in existence at the date of the agree-

ment;" and, again, he says "the authorities are mainly to the effect that such a mortgage conveys no title or interest as against attaching, or judgment creditors of the mortgagor." About this question of mortgaging personal property, to be subsequently acquired, much has been written in the books, which I deem unnecessary to resume here at any great length. It results from a review of the authorities that a mortgage cannot be given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially, when the rights of creditors have intervened. At law such a mortgage must be conceded to be void. The mortgage could have no positive operation to transfer *in presenti* property not *in esse*. At furthest, it might operate by way of a present contract between the parties that the creditor should have a lien upon the property to be subsequently acquired by his debtor, which equity would enforce as against the latter.

In *Bank of Lansingburgh v. Crary*, 1 Barb. 542, Paige, J., observed: "I strongly incline to the opinion that a chattel mortgage can only operate on property in actual existence at the time of its execution; that it cannot be given on the future products of real estate; and that if given one day, or one week, before the product of the land comes into existence, it is as inoperative as if the chattel mortgage had been given on a crop of grass or grain, one, two, or three years previous to its production."

In a subsequent case, the same learned judge considered the nature of a mortgage relating to property not then in existence and its effect as to creditors of the mortgagor. In *Otis v. Sill*, 8 Barb. 102, the plaintiff claimed under a chattel mortgage, which, after describing the property mortgaged, contained the following clause: "All scythes manufactured out of the said iron and steel and all scythes, iron, steel and coal which may be purchased in lieu of the property aforesaid." Subsequently, the property was taken under executions issued on judgments and the action was brought for its taking and detention. Paige, J., refers to his opinion in *Bank of Lansingburgh v. Crary*, that a chattel mortgage could only operate on property in actual existence at the time of its execution. He elaborately discusses the question of whether such a mortgage was a lien upon the property when acquired, as against the creditors of the mortgagor, and reviews very many authorities in England and some in this country. His conclusions were adverse to the proposition. He held that, as to subsequently acquired property, the mortgage could only be regarded as a mere contract to give a further mortgage upon such property and that no specific lien was created thereby. He says, "I have come to the conclusion, as the result of all the authorities, that if the mortgage in this case did

amount to a contract to execute a further mortgage on subsequently acquired property, it was good as an executory contract only and did not constitute a lien on the articles of the kind mentioned therein when subsequently purchased." In *Gardner v. McEwen*, 19 N. Y. 123, the chattel mortgage to the plaintiff, upon property in the store, "or which might thereafter be purchased and put into store," was held inoperative to convey the title to the after-acquired property, as against the defendant, who purchased it at a sale under execution upon a judgment against the mortgagor. *McCaffrey v. Woodin*, 65 N. Y. 459, was an action in trover. Plaintiff was lessee and defendant was agent for the lessor. The former covenanted in the lease that the latter should have "a lien as security for the payment of the rent" on all the personal property, etc., which should be put upon the premises, "and such lien to be enforced, on the non-payment of the rent, by the taking and the sale of such property in the same manner as in cases of chattel mortgages on default thereof." By virtue of this provision in the lease, the defendant took the farm produce. The decision upheld the right of the landlord to do so; holding that as the crops came into existence they vested in the landlord. It is to be noted that the court considered the case as one to be governed by equitable principles, observing that "the matter comes up solely between the parties, there being no intervening rights of creditors." Referring to *Gardner v. McEwen* (*supra*), it was remarked that that "is a case between the mortgagee and creditors and was affected by our act concerning filing chattel mortgages." Treating the question as one for the application of equitable principles, it was held that the lessor was entitled to set up her equitable rights, as a defense to the plaintiff's (the lessee's) action of trover. In the same case, Gray, C., observed that, if the relation of mortgagor and mortgagee had been created between the parties, "it was inoperative upon any property which at the time of its execution was not actually, or potentially, either possessed or owned by McCaffrey." In *Cressey v. Sabre*, 17 Hun, 120, where the opinion was delivered by Boardman, J., and was concurred in by Justices Learned and Bockes, a chattel mortgage upon potatoes (among other articles of property), which were not yet planted, was held inoperative. The distinction was there mentioned between a case like *McCaffrey v. Woodin*, where the question of title was between the parties to the contract and one where it arose between the mortgagee and a third person. In *Coats v. Donnell*, 94 N. Y. 168, Andrews, J., observed that "a contract for a lien on property not *in esse* may be effectual in equity to give a lien as between the parties, when the property comes into existence and where there are no intervening rights of creditors or third persons." *Kribbs v. Alford*, 120 N. Y. 519,

recognizes the invalidity at law of a chattel mortgage of property thereafter to be acquired, but holds that as between the parties their contract would be construed in equity as creating an equitable lien, which could be enforced.

The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed, and the statute makes it valid, as against creditors of the mortgagor, only when filed as directed. The statute provides for the filing as a substitute for "an immediate delivery," or "an actual and continued change of possession of the things mortgaged." Such provisions seem to me to exclude the idea of a chattel mortgage upon non-existent things; or that such an instrument could operate to defeat the lien of an attaching, or an execution creditor upon subsequently acquired property. Regarding the chattel mortgage in question as a mere executory agreement to give a lien when the property came into existence, some further act was necessary in order to make it an actual and effectual lien as against creditors. But there was no further act by the parties to the instrument to create such an actual lien and the levy of the execution upon the crops operated to transfer their possession from the owner to that of the sheriff. As against his possession the equities of the mortgagee are unavailing for any purpose. Between the two creditors it is a question of who had gained the legal right to have the crops in satisfaction of his claim and the equitable right of the mortgagee to them, as against his debtor, was defeated by the seizure at the instance of the judgment creditor. We are satisfied as to the correctness of the conclusion reached by the General Term below, that there should have been a direction of a verdict for the plaintiff for the potatoes and beans, obtained from the planting done after the execution and delivery of the mortgage.

The order appealed from should be affirmed and, under the stipulation, judgment absolute should be ordered for the plaintiff, with costs in all the courts.¹

All concur, except Earl, J., not voting.

Ordered accordingly.

¹ *Butt v. Ellett*, 19 Wall. 544 (1873); *Wheeler v. Becker*, 68 Iowa, 723 (1886), *contra*. But see *Comstock v. Scales*, 7 Wis. 159 (1858); denying effect to a mortgage of a crop made after planting.

Adopt law
view only
Cpt a bl
partic.

omit.

PIERCE v. EMERY.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, 1856.

(32 N. H. 484.)

72

BILL IN EQUITY. The following facts appear from the statements of the bill.¹

The Portsmouth and Concord Railroad, a corporation established under the laws of New Hampshire, made to the complainants, Joshua W. Pierce, Alfred W. Haven, Josiah G. Hadley and to Alexander Ladd, deceased, whose executrix, Maria T. Ladd, is the remaining plaintiff, sundry mortgages, dated respectively February 12, 1850, July 6, 1850, March 10, 1851, May 29, 1851, August 19, 1851, and March 3, 1852, and also made sundry other mortgages to Joshua W. Pierce and Alfred W. Haven, two of the complainants, dated respectively June 26, 1852, July 13, 1852, August 16, 1852, October 15, 1852, November 16, 1852, December 26, 1852, February 12, 1853, June 27, 1854, September 23, 1854, and April 12, 1855.

Holds that while a mty of after acq prop. is no part at con law, yet a legislation may enable corpor. to m. a mty con ing such prop.

The mortgages were of personal property, and the bill set forth a description of it as contained in the different mortgages, and specified the debts and liabilities secured by each. By the first two mortgages, made prior to August 20, 1850, besides specific articles named in the mortgages, all the personal property of the railroad was mortgaged; and by the subsequent mortgages the furniture of the road, locomotives, cars, fencing stuff, fuel, and other personal property, were mortgaged from time to time, in some cases to secure debts that accrued before August 20, 1850, and in others, debts which accrued after that date; but none of the mortgages were given on the sale of property to the road for security of the purchase money.

The mortgage of June 26, 1852, conveyed all the right, title and interest of the railroad to the railroad iron imported in the ship General Berry, then belonging to the road, subject to the lien of the United States for duties, being about 591 tons, to secure a note for \$10,000, dated April 26, 1852. . . .

The several mortgages under which the plaintiffs claim remain in whole or in part unsatisfied. All the property described in the mortgages made after August 20, 1850, was purchased by and came to the possession of the road subsequently to that date; and all the property named in the mortgages running to Pierce and Haven,

¹ This statement of facts has been abbreviated.

with the exception of the iron, was paid for with money lent to the road by the parties named in those mortgages, as is stated therein. In all these mortgages it is stated that they were given for the security of the parties named in them respectively. All these mortgages were duly executed and recorded in Portsmouth, which was by law established as the place of business for the road. . . .

On the 13th of July, 1850, the Legislature of this State passed an act entitled "An act to aid the construction of the Portsmouth and Concord Railroad," authorizing the road to issue bonds to the amount of \$350,000, payable, with interest, in not less than ten, nor more than twenty years; the act to take effect when the stockholders should accept and adopt it. . . .

On the 3d of August, 1850, the stockholders met, accepted the act, and authorized the directors to appoint trustees, make a mortgage, and issue bonds at their discretion. On the 20th of August, 1850, the directors made a mortgage to Robert Rice, William Plumer, Jr., and Josiah Minot, trustees for those who were or should become holders of the bonds, to secure payment of bonds to the amount of \$350,000, issued the same day. The original trustees, by death and resignation, are now out of that office, and the defendants, James W. Emery, Thomas L. Tullock and Nathaniel White, are substituted by appointments made under the act and mortgage.

The mortgage deed to the trustees recites that the trustees had been appointed under the act to take and hold security on all the property of said company, and all its rights, franchises, powers and privileges, in mortgage and in trust, for the payment and security of whoever then or thereafter might become the lawful holders of said bonds, or any of them, and conveys to the trustees, in the name of the Portsmouth and Concord Railroad, "the railroad of said corporation, together with all its rights, powers, franchises and privileges," in the towns in which it was laid out, "with all the lands, buildings and fixtures thereto belonging, or which might thereafter thereto belong, with all the rights, franchises, powers and privileges now belonging to and held, or which may hereafter belong to, or be held, by said corporation; together with the locomotive engines, passenger, baggage, dirt, freight and hand cars, and all the other personal property of said corporation, as the same now is in use by said corporation, or as the same may be hereafter changed and renewed by said corporation; to have and to hold the said railroad, franchises and estate aforesaid, whether real or personal, with all the privileges and appurtenances, legislative grants, powers, rights, and privileges, now or hereafter granted, thereto belonging," in trust for the bond-holders, and in mortgage for security of the bonds; and the trustees are empowered by the deed,

on breach of the condition, to sell "the said railroad," and to make all necessary conveyances, "passing all the property, real, personal and mixed, rights, powers, franchises and privileges of this corporation," to the purchaser or purchasers.

On the same 20th of August the directors issued bonds to the amount of \$350,000, from which the road realized \$289,535, and no more. At that time the road owed about \$158,700, and have since expended in constructing and furnishing the road at least \$573,000, and of the debts then owing more than \$100,000 have been paid.

The condition of the mortgage to the trustees having been broken, the present trustees, Emery, Tullock and White, at the request of certain bond-holders, according to the terms of the mortgage, on the 14th day of May, 1855, applied to the directors to surrender to them all the mortgaged premises; and the directors by deed of surrender, dated May 31, 1855, surrendered and transferred to them all the property, rights, powers, franchises and privileges named in the deed of mortgage, to hold according to the terms and conditions thereof. The trustees have taken possession of the road, and under their mortgage claim the property mortgaged to the complainants; and the property has been delivered into the hands of the trustees, under an agreement that it should be used in operating the road, and a compensation paid for it.

The stockholders have voted that it is inexpedient to redeem the road and its property from the mortgage to the trustees, and under the provisions of the mortgage the trustees will be bound to sell, in about eight months from the 31st of May, 1855, and they threaten to include in their sale the property mortgaged to the complainants.

The original trustees, when they took their mortgage, had notice of the prior mortgages, and also many persons who afterwards became purchasers and holders of the bonds.

The present trustees and the Portsmouth and Concord Railroad are the parties defendant to the bill.

The bill prays that the trustees may be decreed to pay the complainants the debt secured by their mortgage, before they sell the property mortgaged to the complainants, and be enjoined not to sell until they pay; or, if allowed to proceed with the sale, may be decreed to pay out of the proceeds the debts secured by the complainants' mortgage, for a foreclosure and for general relief.

PERLEY, C. J.¹ Corporations, as a general rule, have power to sell their property, real and personal, and to mortgage it for the

¹ Portions of the opinion have been omitted.

security of their debts (Com. Dig., Corporation, F, 18; *Barry v. Merchants' Exchange Co.*, 1 Sand. Ch. 280; *Despatch Line of Packets v. Bellamy Manuf. Co.*, 12 N. H. 206).

Railroads, by the law of this State, are public corporations, so far as to be subject in many respects to general legislation and the control of the public authorities. They are created to answer a public object, and are bound to the State for the performance of their public duty. They can do no act which would amount to a renunciation of their duty to the public, or which would directly and necessarily disable them from performing it. They cannot convey away their franchise and corporate rights, nor perhaps the track and right of way which they take and hold for the necessary use of their road.

But they may contract debts; may purchase on credit; and we see nothing in the nature of their business, or in their relation to the public, which should prevent them from making a valid mortgage of their personal property, not affixed to the road, though used in the operation of it. Instead of disabling the road from performing its public duty, a mortgage might assist in doing it, in the same way that other corporations or individuals are aided in carrying on their business by mortgages of their property.

The two mortgages made to the complainants before the mortgage to the trustees for the bond-holders, we think are valid to hold the personal property specifically described in them for the security of so much of the debts as remain unpaid. The bill does not state how much of those debts are still due. But the complainants have no right in the road by virtue of those mortgages; they must assert their security by taking the property away, as in the case of a mortgage by an individual.

A different and more difficult question arises as to the claim of the complainants under mortgages made after the 20th of August, 1850, the date of the mortgage to the trustees for the bond-holders.

The ground taken by the bond-holders is that the act of the Legislature authorized a mortgage, not only of the property which at the time belonged to the road, but of all the franchises and corporate rights of the road, and the road itself; that the trustees under such a mortgage would take, as security for the bonds, the railroad and all its franchises and rights, as one entire thing, and that, as incident to this mortgage of the road and its franchise, all the property, real and personal, which might at any time afterwards become vested in the road, would be covered by the mortgage, and held by the trustees, subject to the right in the directors, until breach of the condition, of managing the road for the benefit of all

concerned, and of selling such of the property from time to time as might be convenient in the course of the business, provided they substituted other property of equal value; that when the trustees should make a sale under their mortgage, all the property, and all the franchises and corporate rights of the road would pass to the purchasers, subject in their hands to the public liabilities and duties of the corporation; that the mortgage deed in this case exhausts the powers conferred by the act, and covers the road and its franchises, and the accruing property, as an accession to the thing mortgaged and as part and parcel of it; that consequently the lien of the mortgage to the trustees attached upon property subsequently acquired immediately upon its vesting in the road, and the claim of the complainants must be postponed to the mortgage made for security of the bond-holders. Whereas, the complainants maintain that the act confers no power to make such a mortgage, and that the mortgage to the trustees does not cover property of the road subsequently acquired.

We take it to be a general rule of the common law that nothing can be mortgaged that is not in existence, and does not at the time of the mortgage belong to the mortgagor (*Tapfield v. Hillman*, 4 M. & G. 240; *Lunn v. Thurston*, 1 M., G. & S. 383; *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 Met. 17).

This rule, that a mortgage cannot cover future acquisitions, would seem to have been established on the technical ground that a mortgage is a sale upon condition, and by the common law there could be no sale of a thing not *in esse*, and not at the time the property of the seller.

By the civil law a mortgage may cover the future property of the mortgagor (Domat., part 1, book 3, tit. 1, § 1, articles 5 and 7). And in some jurisdictions where the maxims of the common law prevail, mortgages have been sustained covering the future and shifting stock of a trading or manufacturing establishment; as in the case of *Holly v. Brown*, 14 Conn. 255. So in *Abbott v. Goodwin*, 20 Maine, 408, a mortgage of a stock in trade and of the substituted goods was held to be valid. And such a mortgage was sustained against an assignee in bankruptcy in *Mitchell v. Winslow*, 2 Story, 630. In these cases, not merely the existing property, but also the business and establishment appear to have been regarded as the subjects of the mortgage; and the mortgagor, while he remained in possession, was looked upon in the light of an agent for the mortgagee, so far as his interest was concerned, with an implied authority to buy and sell, and manage generally, according to the usual course of the business.

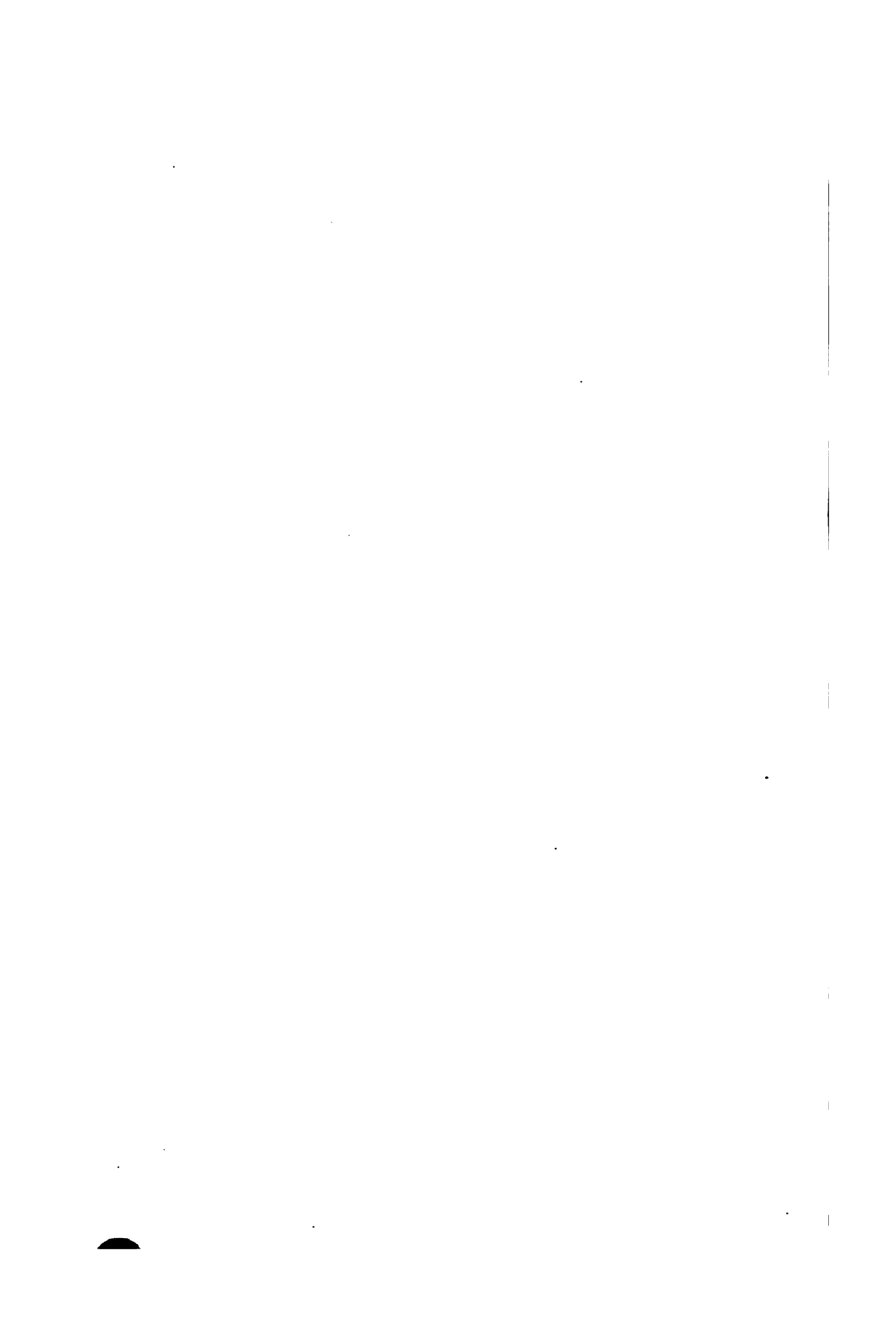
Even where the strict rule against the mortgaging of subsequently

)

|

|

|



acquired property is enforced, if the mortgage purport to cover such property, and the mortgagee take possession, with assent of the mortgagor, before another title attaches, he will hold from time to time, not as mortgagee, but as pawnee, under the contract contained in the mortgage (*Rowley v. Rice*, 11 Met. 333). And in mortgages of real estate it is a familiar rule that buildings, and other things annexed to land after the mortgage, are regarded as accessions to the original subject of the mortgage, and covered by it (*Pettingill v. Evans*, 5 N. H. 54).

[There is, therefore, no intrinsic difficulty in a mortgage which should cover the future and shifting stock and property of a trading or manufacturing establishment, or of a corporation. But by the common law, according to the weight of authority in other jurisdictions, and as we understand the rule to be in this State, no mortgage can be made to cover any personal property, except specific articles belonging to the mortgagor at the time of the mortgage; and, unaided by the special act of the Legislature, the railroad in this case would have no power to make a mortgage that should have the effect contended for by the bondholders. The question whether the trustees can hold subsequently acquired property against the claim of the complainants, will, therefore, depend on the construction of that act and of the mortgage deed made under it.] Did the act authorize the road to make a mortgage which should cover property of the road afterwards acquired? and if so, did the directors make such a mortgage in this instance?

The word "franchise," so often used in the act and in the deed, has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation; and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. A municipal corporation, for instance, may have the franchise of a market, or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. In a more popular sense the political right of subjects and citizens are called franchises, like the electoral franchise (Com. Dig., Franchise, F, I.; Angell & Ames on Corp. 3; *The King v. London, Skinner*, 310, 311).

A corporation, being itself a franchise, consists and is made up of its rights and franchises; and when all its franchises are gone, by surrender, by forfeiture judicially ascertained, by limitation of the grant, or in any other way, the corporation has no longer any practical existence. If the franchise or franchises are of a nature to continue after they are lost by the corporation, they may be re-granted to another corporation, or to other individuals; but the former corporation is substantially dissolved (2 Kent's Com. 305,

and note *a*, 308 and 309; *The King v. Pasmore*, 3 T. R. 199; *Com. v. Hancock Bridge*, 2 Gray, 59, 60).

The grant of a corporation is a contract between the State granting it and the grantees. It is peculiarly and emphatically so in the case of railroad corporations, which are created upon public considerations, and clothed with extensive and extraordinary powers, for the purpose of enabling them to accomplish the public object contemplated in the grant. The members and stockholders have private rights; but the corporations are also bound to the discharge of their public duties, and cannot, without the aid of special legislation, disable themselves from performing their duty to the public by alienating or transferring their corporate rights and franchises. They may sell or mortgage their personal property, but they cannot sell or mortgage with it the right to manage and control the road, nor any other corporate right or franchise (*The King v. The Severn & Wye R. W. Co.*, 2 B. & Ald. 646; *Reg. v. The Eastern Counties R. W.*, 10 Adol. & Ellis, 531; *Reg. v. South Wales R. W. Co.*, 14 Ad. & Ellis (N. S.) 902; *Clark v. Washington*, 12 Wheaton, 46, 54; *Winchester & Lexington Turnpike R. Co. v. Vimont*, 5 B. Monroe, 1; *Arthur v. The Commercial & R. R. Bank*, 9 S. & M. 394).

If this corporation had authority to make a mortgage that should convey the franchise and corporate rights, the power must be derived from the special act. It is a very familiar rule in the interpretation of statutes that all parts of the act must be considered together, and such construction given to it as will best answer the intention of the makers. To accomplish this object, in some cases the letter of the statute may be restrained by an equitable construction; in others, enlarged; and sometimes the construction may be even contrary to the letter (*Holbrook v. Holbrook*, 1 Pick. 250; *Somerset v. Dighton*, 12 Mass. 384). On examination of this act it will at once be seen that the several parts cannot all take effect in the sense that would most naturally belong to each, if they were considered separately. In the third section the directors are authorized to mortgage "the whole or a part of the real or personal estate of said corporation." Stopping here, and taking this clause by itself, no inference can be drawn from it of an intention to give the power of mortgaging the franchises or future acquisitions and accessions of personal or real estate. This is the clause in which the authority to mortgage is directly conferred. If a more extensive power were intended to be given by the act, why is no mention made of it here? The argument drawn from this part of the act against the construction contended for by the bondholders, goes upon the ground that this clause was intended to include and define all the powers of mortgaging conferred by the act.



But by the same section the trustees are authorized to sell, according to the conditions and limitations that may be contained in the mortgage deed, "the real and personal estate, and all rights, franchises, powers and privileges named in said mortgage deed." The directors therefore are authorized to *name* in the mortgage deed, not only the real and personal estate, but rights, franchises, powers and privileges of the corporation. The rights and franchises named in the deed are to be disposed of by sale, to enforce the mortgage security in the same way with the property mortgaged; and there is nothing from which it can be inferred that the rights and franchises, and the property of the corporation, are not to be named in the same way and conveyed in the same way by the deed; that is to say, the rights and franchises are to be conveyed and mortgaged like the property, and are to be disposed of under the mortgage for the same purpose, and in exactly the same manner. The directors may *name* in the mortgage—in other words, they may convey in mortgage—any part or all the real and personal property, and any or all the rights, franchises, powers and privileges of the corporation. The act sets no limit on their discretionary power in this respect; and whatever the directors *name* in the mortgage which they give in behalf of the road, is to be disposed of in the same way for the satisfaction of the mortgage debt, whether it be the property or the rights and franchises of the corporation. The power to mortgage the rights and franchises, as well as the property of the corporation, is plainly and necessarily implied from these provisions of the act.

The act, therefore, does not limit the power of mortgaging to real and personal property on hand at the time, but gives authority to mortgage the rights and franchises of the corporation, which could not be done without the aid of the act. And it cannot be maintained that the authority to mortgage real and personal property given in one part of the act, was intended to be exclusive of all further power, when the further power of mortgaging the rights and franchises of the corporation is clearly given by necessary implication in another part of the same section. . . .

The directors then had power under the act to name in their mortgage, and to convey in mortgage to trustees, all the property, and all the rights, franchises, powers and privileges of the corporation. If they made such a mortgage it would convey to the mortgagees all the right and power which the corporation had to acquire and hold property, for the power to acquire and hold property is one of the rights and franchises of the corporation. That right would be conveyed and transferred from the road to the trustees by the mortgage deed, in the same way that the property was conveyed and transferred, subject to the condition of the mortgage;

and the subsequently acquired property would pass under the mortgage as incident to the right of acquiring and holding it, which would be vested in the trustees by the mortgage.

The purchasers under the deed of the trustees "acquire all the rights, franchises, powers and privileges which said corporation possessed, and the use of said railroad, with all its property and rights of property, for the same purposes and to the same extent that said corporation could use the same, if said deeds had not been made, subject to the same liabilities as to the use of said railroad that said corporation would be under if said deed had not been made." All this the purchasers take through a sale authorized to enforce the mortgage security; and we cannot understand that anything different from this, or less than this, was authorized to be mortgaged and covered by the mortgage for the security of the mortgage debts. It is contrary to all the received notions of a mortgage that anything should be sold under it to pay the debts secured, that was not mortgaged and covered by it before the sale.

It would seem to be the plain intention of the act to preserve the corporate rights and franchises, and maintain the corporate liabilities in the hands of the purchasers at the trustees' sale. All the rights and franchises of the corporation, and the use of the road, are transferred to them by the deed of the trustees, and they hold the corporate rights and franchises, subject to the same liabilities as to the use of the road by which the corporation was bound before the sale. They have all the property and all the rights and franchises, and are likewise bound to perform all the public duties of the corporation. It is not easy to see how the original corporation, in the hands of the former corporators, could, after such a sale, have any practical or even legal and theoretical existence. They could hold no property; they could maintain no action, nor elect any corporate officer; these powers are all rights and franchises of the corporation, created and granted by the act of incorporation, and are all transferred and conveyed by the deed of the trustees to the purchasers under their sale. In some cases, after the franchises of a corporation are lost by forfeiture, the corporation is still held to exist in contemplation of law, so far as to be capable of being revived by a regrant from the government. But here the franchises would not be forfeited to the State, but transferred to the purchasers; and the State could not revive the old corporation by a regrant of the franchises, which had become vested in the purchasers. The sale would in substance transfer the road and the corporation to the purchasers.

There may be a difficulty, which it is not necessary to anticipate, in saying how the purchasers shall exercise some of these rights. There is no provision in the act for their doing it through the

machinery of the old corporation. They may, perhaps, be regarded somewhat in the light of new grantees of the old franchises.

If, then, the purchasers under the trustees' sale take what was originally mortgaged, and take all the property, rights and franchises of the corporation, to hold and enjoy as the corporation held and enjoyed them, they take substantially the corporation itself; and the corporation itself was the thing originally mortgaged. . . .

An analysis of the act and an examination of the several parts, when taken together and compared with each other, lead to the conclusion that the Legislature intended to grant the power of mortgaging all the property and all the rights and franchises of the corporation, including the right to property subsequently acquired. We have not been able to discover anything in the act which directly contradicts, or by any necessary implication excludes this construction. There are express grants of particular powers in different parts of the act, from which the argument is drawn, that nothing more than is there expressed was intended to be granted elsewhere. For instance, in one clause authority is given to mortgage all or part of the real or personal property of the road. But it is quite plain from other provisions that this was not intended to be the limit of the authority conferred. The provisions for the sale and transfer to the purchasers under the mortgage of all the rights and franchises are practically inconsistent with such a narrowed construction of the act. The material and substantial provisions of the act cannot be carried into effect without construing it to give the power of mortgaging the road, and all its rights and franchises, as an entire thing, and subsequently acquired property, as an incident to the general subject of the mortgage, and an accession to it.

The general design and object of the act favor the same construction. The corporation already had power under the general law to mortgage their property then in possession, and for that purpose had no need of special legislation. The act must have intended to enlarge that power, and authorize the road to make a mortgage substantially different from such as are allowed at common law; and that intention would not be answered if the act should be so construed as to limit the power of mortgaging to property then owned by the road. The act is entitled "An act to aid in the construction of the Portsmouth and Concord Railroad." The road was unfinished, and the money borrowed on the security of the mortgage was to go into the road, to assist in the enterprise and undertaking. The statements of the bill show that at the time when the mortgage to the trustees was made, all the personal property of the road had been already mortgaged to these complainants for the security of other debts. There is nothing in the

case which furnishes any ground to infer that the road had then any unincumbered property capable of being mortgaged. If so, and the mortgage to the trustees could attach on nothing but property then belonging to the road, all that the bond-holders would have under their mortgage for security of their demands would be a right in equity to redeem property of the road already mortgaged for other debts. This, we think, is not the security upon which the bondholders supposed they were lending their money, nor the security which the Legislature intended to give them by the act. The general design must have been to give those who advanced money to complete the road on credit of the mortgage specially authorized by the act, a substantial and available security, and a preference over other subsequent creditors.

But if all subsequently acquired property might be mortgaged to secure other debts, new and old, and those mortgages were upheld against the bond-holders, money might be obtained on such security to carry on the road, to pay interest on the bonds, or even to pay dividends, and when possession should be taken for the bond-holders, perhaps at the end of ten or twenty years, they might have little for their security but the franchise and road-bed; for much of the iron and other materials since affixed to the road are covered in terms by the complainants' mortgages, and claimed under them. If other creditors of the road had stood on such terms with the directors and managers as would enable them to obtain mortgages of the newly acquired property, as it fell from time to time into the hands of the corporation, the bond-holders, instead of having a preference, would have been the last creditors likely to realize anything from their security, in case the road should turn out to be insolvent.

The object of the act being to give the bond-holders a substantial and available security for their money, and a preference over other creditors not previously secured, can only be answered by so construing the law as to give the bond-holders security upon the road itself, as the general subject matter of their mortgage, and upon the changing and shifting property of the road as part and parcel by accession, of the thing mortgaged.

The question is certainly not free from difficulty; but whether we look to the particular provisions, or follow what we must understand to have been the general object and design of the law, we are on the whole brought to the conclusion that it authorized the directors to mortgage, not only the property then belonging to the road, but all the franchises and rights of the corporation, and, in substance, the road and corporation itself. That if the directors made such a mortgage, as incident to the franchise and corporate rights mortgaged, subsequently acquired property, immediately

upon its vesting in the corporation, would, as an incident and by accession, become part of the thing originally mortgaged, and of the mortgage security. The right to take and hold property being one of the franchises mortgaged, the corporation would have no power to take or hold property, except by virtue of that franchise and under the mortgage by which the franchise was covered.

We are of opinion, then, that the act authorized the corporation to mortgage the whole road as an entire thing, with all its corporate rights and franchises, and incidentally, and by way of accession, all the subsequently acquired property of the road. Did the directors in fact make such a mortgage? . . .

Taking the whole deed together the intention is very apparent to mortgage, not merely property then belonging to the road, but the road itself and all its franchises, as one entire thing, and, as an incident and accession, all property of the corporation afterwards acquired. And such we think was the legal operation of the deed under the act. . . .

The demurrer must be overruled, as it is taken to the whole bill, and the complainants are entitled to part of the relief for which they pray. The demurrer may, however, be amended so as to apply to part only of the bill, and the defendants answer to the residue.¹

¹ *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431 (1857), *accord*. See also *Dinsmore v. Racine & Miss. R. R. Co.*, 12 Wis. 649, 656 (1860); *Farmers' Loan & Trust Co. v. Fisher*, 17 Wis. 114 (1863), and *Pierce v. Milwaukee & St. Paul R. R. Co.*, 24 Wis. 551 (1869).

In *Howe v. Freeman*, 14 Gray, 566 (1860), the Supreme Judicial Court of Massachusetts sustained a mortgage of the road and property of a railroad "and all additions made thereto by adding new locomotives, cars, and other things," on the ground of an express legislative ratification thereof. "This legislative act obviates the second objection to the right to maintain the action—that a mortgage will not pass chattels or personal property not in existence, or not owned by the mortgagor, at the date of the mortgage. The legal principles, stated by the defendant on this point, are entirely correct in reference to ordinary mortgages, and would have been fatal to this action if no legislative authority had intervened, ratifying and confirming this particular mortgage. But the statute did thus intervene, confirming the mortgage, and thus giving effect to all parts of it, including the provision as to after acquired machinery and cars. This mortgage was duly recorded, and thus, by means of the record and the statute, the lien thereby created was duly notified to all persons having business relations with the Vermont and Massachusetts Railroad Company."—*Per Dewey, J.*

The matter is now regulated by general statute in Massachusetts (Mass. Pub. Stat., 1882, Ch. 112, § 72). So in several other States (Conn. Gen. Stat., 1888, § 3572; Minn. Gen. Stat., 1894, § 2724).

Action was taken by a 2nd mortgagee (after property acquired) is not mortgage held 2nd mortgagee not maintain title.

MORRILL v. NOYES, 56 Me. 458 (1863). The question whether a mortgage of personal property not in existence, or not owned at the time by the mortgager, can be made available by the mortgagee, as a lien upon property afterward acquired, has been discussed in many recent cases, with some apparent difference of opinion.

Some of the courts have denied that any difference exists, and have attempted to reconcile the cases on the ground that such a mortgage, though void at law, is valid in equity. But this is a loose use of language, that tends more to confuse than to reconcile. If such a mortgage is absolutely void, for want of any subject matter to support it, then it should be so held in equity, as well as at law. But, if not thus void, to what extent, and in what sense, is it valid? It is only by conceding its validity, that it is pertinent to inquire whether the remedy is in equity, or by a suit at law.

In other cases the reasoning is syllogistic and summary. "*Qui non habet, ille non dat.*" A mortgage is a grant. Therefore a mortgage of what one does not own, or of what is not in esse, is void. But a mortgage is a grant, to be defeated upon a condition. This makes it merely the creation of a lien, with certain rights to secure and enforce it. A lien may be created without a grant. And sometimes a contract intended as a grant, but ineffectual as such, will be upheld in equity as a lien. So that the syllogism is by no means certain to dispose of the question.

As a general proposition it may be said, that a mortgage of such goods as may be in a store on a future day—or of such furniture as may be in a house—or of such machinery as may be in a mill—or of such stock as may be on a farm—when no particular property is referred to, will not convey any title to, or create any lien upon, such property subsequently acquired, which can be upheld or enforced in a suit at law (*Head v. Goodwin*, 37 Maine, 181; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Cush. 306; *Otis v. Sill*, 8 Barb. 102; *Gardner v. McEwen*, 19 N. Y. [5 Smith], 123; *Tapfield v. Hillman*, 46 Eng. C. L. 243; *Lunn v. Thornton*, 50 Eng. C. L. 379; *Gale v. Burnell*, 53 Eng. C. L. 850). In Connecticut, a mortgage of a shifting stock of goods in a store, was held to create the same lien upon goods subsequently purchased as upon those owned at the time (*Holly v. Brown*, 14 Conn. 255). A similar decision was made in this State, in the case of *Head v. Goodwin*, 37 Maine, 181. But that case was questioned in *Jones v. Richardson*, 10 Met. 481; and it was substantially overruled in *Pratt v. Chase*, 40 Maine, 269. The question is therefore no longer an open one in this Court.

It should be noticed, however, that in nearly all the cases cited,

Future shifting stock of P.R. is subject to mtge when P.R. itself is mortgaged.

Suggested grounds: - 1. May be an equitable lien without a grant. 2. Shifting stock has a potential existence.

3. Creation of corp. granted legis. authority to mortgage.

4. Shifting stock may be mortgaged.

The mortgagee can have lien

Also in Mich.

Probably everywhere R.R. can mortgage its after-acquired property. Either in Equity or at law. Prob. in most states can at law. More dis. as to whether shd be good at all, than as to whether good at law or Equity.

Reasons given:

1. Are fixtures. Can't apply to after-acquired land. But may as to rolling stock. That by virtue of authority rolling stock is not fixtures. Its in some states has been classed then fixtures & is about equal number have declared them personally. When fixtures the mortgage becomes a legal mortgage on them as soon as placed in operation, just as it wd become a legal mortgage on a house.
2. In quite a number of states is express legis. authority to mortgage all R.R. prop. This is often held to give power to mortgage & to make mortgage good at law.
3. Are a few cases like ours which would simply make rolling stock an exception & permit legal mortgage of it tho' after-acquired. Talk about potential distance is bad, of course. Wd seem working mortgage good in Equity as in any other case of mortgage of after-acquired property shd be enough.

If good only in Equity - then of course B.F.Ps. cd take free of it. [By recording can always prevent B.F.Ps. Prob not. Because have to look up records back to time when party got title. Wd not have to go further back to see if any mortgage before he got title. That, at least, is

rule as to realty. Perhaps as to personally
and be held dif. as have to run risk of
Vendor having no title anywhere. No
provision that all transfers of personally
have to be recorded. Only few cases as
to realty. Know of none as to personally.

No matter whether good at law or in
Equity it is subject to liens for pur-
chase price, to rescission of sale
transferring title to utgor for fraud
or the like, that is, to Equities in
favor of Vendor to utgor which arise
out of sale. It is that both its
attach at once upon property becom-
ing utgor. Which shall prevail. The
one whose money created the fund
that both are claiming. Otherwise
and be unjust enrichment of utgor
at expense of Vendor.

the mortgages were exceedingly indefinite. Some of them described no particular property which could be identified; but they were mortgages of mere contingencies of such property as the mortgagers might purchase, if they should purchase any. [They were void for uncertainty, if for no other reason (*Winslow v. Merchants' Ins. Co.*, 4 Met. 306). Except the case of *Otis v. Sill*, 8 Barb. 102, they probably would not have been upheld in equity, any more than at law (*Mogg v. Baker*, 3 Mees. & Welsb. 195; *Moody v. Wright*, 13 Met. 17).

We can understand these cases better by referring to another class in which conveyances of property, not in existence at the time, have been upheld, either at law or in equity. And we think it will be seen that sales or mortgages of such property have been sustained when within the following rules:

1. The contract must relate to some particular property described therein, which, though not in existence, must be reasonably certain to come into existence, so that the minds of the parties may be in agreement as to what it is to be, and, if the sale is absolute, what, with reasonable certainty, taking the ordinary contingencies into consideration, is the present value?

2. The vendor or mortgagor must have a present, actual interest in it, or concerning it. As is said in illustrating Rule 14, of Bacon's Maxims, "the law doth not allow of grants, except there be the foundation of an interest in the grantor." There must be something in presenti, of which the thing in futuro is to be the product, or with which it is to be connected, as necessary for its use, or as incident to it, constituting a tangible, existing basis for the contract.

The application of these principles to the multifarious affairs of a business people, may sometimes be difficult. And in the various enterprises that are likely to be undertaken in a country distinguished for its manufactures, and its domestic and foreign commerce, new applications of them from time to time may be required. But the illustrations to be found in the decided cases will be sufficient for our present purpose.

Thus, one may sell all the wool which shall grow for a term of years on sheep owned by him at the time; but not the wool to be grown on so many sheep, if he does not own them (*Grantham v. Hawley*, Hobart, 132; *Smith v. Atkins*, 18 Verm. 461). So he may sell the grass, or any crop that does not require annual renewal, that shall grow upon his farm for a term of years (*Jencks v. Smith*, 1 Coms. 90; *Bank of Lansingburg v. Crary*, 1 Barb. 542; *Milliman v. Neher*, 20 Barb. 37).

If one contracts for the construction of a carriage, or a vessel, for himself, and pays therefor, he acquires no title until it is com-

pleted and delivered (*Muclow v. Mangles*, 2 Taunt. 318; *Comfort v. Kiersted*, 20 Barb. 472). But if he buys a chattel in process of construction, and it is delivered to him, though afterward to be finished, the title passes, and the additions made to it for the purpose of completing it become his property from the time when they are attached to it. The only reason why the conveyance of a vessel on the stocks was not upheld as a mortgage, in *Bonsey v. Amee*, 8 Pick. 236, was because there was no delivery, and the registry law had not then been enacted, which renders a delivery unnecessary (*Call v. Gray*, 37 N. H. 428). A mortgage of unfinished chattels gives the mortgagee a good title to them when finished (*Harding v. Coburn*, 12 Met. 33; *Jencks v. Goffe*, 1 R. I. 511; *Perry v. Pettingill*, 33 N. H. 433).

So the owner of a ship may assign the freight of a voyage which has been commenced. *In re ship Ware*, 8 Price, 269; *Douglas v. Russel*, 1 M. & K. (7 Eng. Ch.) 488. Or he may sell the oil and cargo to be brought home from a whaling voyage then being prosecuted (*Langton v. Horton*, 1 Hare, 549; *Fletcher v. Morey*, 2 Story, 555). And a laborer, employed by another, may assign his wages afterwards to be earned; but not unless they are to be earned under an existing contract (*Mulhall v. Quinn*, 1 Gray, 105; *Twiss v. Cheever*, 2 Allen, 40; *Lannan v. Smith*, 7 Gray, 150).

In the case at bar, the subject matter of the contract was sufficiently definite and certain; its subsequent existence was reasonably sure; and the mortgagers had an existing interest in, and title to, the other property then mortgaged of which this was to be an essential part, necessary for its use, to be added to it for the purpose of finishing it. It is entirely unlike the case of a changing stock of goods.

The mortgagers had a charter for a railroad, with all the necessary franchises and rights for its construction, equipment, and operation. The mortgagee had previously contracted to construct and equip it for the company; and the work had been commenced. He was to be paid partly in the bonds of the company, which would sell in the market. Thereupon they mortgaged to him, and in trust for the holders of the bonds, their franchise, road, rights of way, materials, buildings, completed or in process of construction, "including all cars, engines and furniture, that have been or may be purchased for or by said company," to secure the contract "for the construction and equipment of said railroad," and to secure the payment of the bonds to be issued to the mortgagee, to him, "or to his assigns, who shall become the holders of said bonds."

A large part of the numerous railroads in this country have been constructed by the aid of mortgages to individuals or to trustees. Many of these mortgages, perhaps most of them, embrace,

has potential
existence

paid
from mortgage

The
facts.

specifically, engines and cars, to be subsequently acquired. As they are made to secure bonds not to be due for many years, and the rolling stock is perishable, unless such future acquisitions can be mortgaged, as incident to, and essential to the use of, the railroad itself, the security is liable to be greatly diminished. The question is one of great importance in respect to the interests involved in its determination. Nor is it a new one. It has been considered by several courts of the highest respectability; and such mortgages have been sustained, not only as to existing property, but as to that subsequently acquired (*Pierce v. Emery*, 33 N. H. 484; *Seymour v. C. & N. F. Railroad Co.*, 25 Barb. 286; *Trust Co. v. Hendrickson*, 25 Barb. 484; *Coe v. Hart & al.*, 6 Am. Law Reg. 27; *Pennock v. Coe*, 23 Howard, 117; *Phillips v. Winslow*, 18 B. Monroe, 531).

Cts.

In nearly all these cases the question is discussed with much research and force of reasoning. And, in the absence of contrary decisions, they constitute a weight of authority not to be disregarded, unless it can be clearly shown that they are erroneous.

In some of them, the companies were specially empowered by legislative acts to mortgage their property and franchises. In the case of *Howe v. Freeman*, 14 Gray, 566, such a mortgage was upheld on the subsequent confirming statute, with an intimation that otherwise it would have failed. But the general question was not considered by the Court. The power of a corporation, without any legislative act, to mortgage its franchises with other property, to secure its liabilities, has never been questioned in this State, though such mortgages have been common for many years, and rights under them have been determined in this Court. The weight of authority in this country is in favor of the doctrine that the power to mortgage is incident to the rights granted by the Act of incorporation. . . .

Legislation
authority.

In the case of *Trust Company v. Hendrickson* it was held that, as between mortgagors and mortgagees, the engines and cars were fixtures, so that, without any express grant, they would have become the property of the mortgagees by being attached to the railroad. If they were fixtures, that result would follow, although they were not in existence when the mortgage was given. That they have some of the qualities of fixtures cannot be denied. They are fitted to the gauge of the road, and are adapted to the particular use upon it. In the modern cases, whether an article is a fixture is determined more by such considerations, than by its being actually attached to the land. Without the rolling stock, the road is not only worthless to the company, but it ceases to be of any public use. Important public interests are therefore involved in the question.

are fixtures

But, if the engines and cars are not fixtures, they are so connected with the railroad, and so indispensable to its operation, that there is a clear distinction between them and other kinds of personal property. They may well be held to be exceptions to the general rule that property not *in esse* cannot be conveyed. We do not mean to intimate that rolling stock to be subsequently acquired could be mortgaged without the railroad. But when the railroad itself is mortgaged, with the franchise, the rolling stock to be acquired for the purpose of completing or repairing it is so appurtenant to it, that the company have a present, existing interest in it, sufficient to uphold the grant of both together—the one as incident to the other. Their title to the railroad is “the foundation of an interest” in the cars and engines to be acquired for its use.

“If the rolling stock on the road should be removed,” says McLean, J., in the case of *Coe v. Hart*, “it would defeat the liens of creditors to many millions of dollars, and put an end to the construction, if not to the maintenance of railroads.” In the case of *Ludlow v. Hurd*, 6 Am. L. Reg. 493, Storer, J., remarks: “It is very clear that we must regard it (the rolling stock), as appurtenant to a railroad; it is necessary for the working of it that all this species of property should become a part of the road itself. It is essential to its use; and if denied, it is destructive to the purpose for which it was built.” And in the case of *Phillips v. Winslow*, before cited, the Court say that, in order to render the mortgage of the railroad effectual, “it is necessary that it should embrace all such future acquisitions of the company as are proper accessions to the thing pledged, and essential to its enjoyment.”

That a mortgage of a railroad and the franchises of the company, with all the rolling stock then owned and to be afterwards acquired and placed on the road, will create a valid lien upon cars and engines subsequently purchased, there would seem to be no longer any doubt (Redfield on Railways, § 235, notes 21 to 24; Pierce’s Am. Railroad Law, 531; Am. Law. Reg., July, 1863, 527).

The decisions sustaining such mortgages are not understood to be in conflict with those in which other mortgages of such property have not been upheld. The general rule, that property not *in esse* cannot be conveyed, is not abrogated. Nor will such mortgages be upheld in equity, any more than at law, unless they are within some of the exceptions to the rule. But, if a mortgage is within any of the exceptions it will be sustained, and the parties will be entitled to appropriate remedies.

What remedies will be open to them must depend upon the circumstances of each case. In *Holroyd v. Marshall*, 9 Jur. N. S. 213,

recently decided by the House of Lords, a registered mortgage of machinery in a mill, together with all that should afterward be placed therein in addition to, or in substitution for that which was there at the time, was held to have created a valid lien upon the portion afterwards purchased, from the time when it was brought within the terms of the grant. And the rights of the mortgagee were sustained in equity, on the ground that the mortgagor, as soon as he purchased the additional machinery and put it into the mill, held it in trust for the mortgagee. Whether we should uphold such a mortgage, is a question upon which it is unnecessary to express any opinion. The case seems to be in conflict with that of *Moody v. Wright*, 13 Met. 17. But in those cases in which a mortgage of such property is valid, there would seem to be no doubt that it can be enforced in equity as a case of trust. . . . ?

Upon the whole case, we are of the opinion that the mortgage to Myers created a valid lien upon the engines and cars as they were purchased and placed upon the road for the purpose of equipping it; and that the holders of the bonds secured by that mortgage will be entitled, if they claim it, to have the trust enforced, not only against the railroad, but against the rolling stock subsequently acquired.¹

Plaintiff's nonsuit.

Appleton, C. J., Kent, Walton and Dickerson, JJ., concurred.

Print.

PLATT v. NEW YORK & SEA BEACH RAILWAY CO.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, 1896.

(9 App. Div. 87.)

85-

*Future ruling
stock subject
to mortgage as
to creditors
of N.Y. has
practically given
it the character
of realty.*

Appeal by the petitioner, August Meidling, as guardian *ad litem* of August Meidling, Jr., an infant, from an order of the Supreme Court, made at the Kings County Special Term and entered in the office of the Clerk of the County of Kings on the 23d day of May, 1896, denying the petitioner's motion to vacate an order appointing a receiver and also a judgment entered in the action, or to modify the same.

¹ *Miller v. Rutland & Washington R. R. Co.*, 36 Vt. 452, 456 (1863); *Farmers' Loan & Trust Co. v. St. Joseph & Denver City Ry. Co.*, 3 Dillon, 412 (1875), accord. See also *Palmer v. Forbes*, 23 Ill. 301 (1860). This view has become fixed in several States by statute (Ver. Rev. L., 1894, § 3803; Wis. Stat., 1898, § 1838). Compare *Hoyle v. Plattsburgh & Montreal R. R. Co.*, 54 N. Y. 314 (1873), and *Williamson v. New Jersey Southern R. R. Co.*, 29 N. J. Eq. 311 (1878).

This action was brought for the purpose of foreclosing a mortgage executed by the New York & Sea Beach Railway Company. On January 11, 1896, the plaintiffs in this action procured an order appointing a receiver of said company, and of all the property then owned by it. Subsequently a judgment of foreclosure was entered by which the receivership was continued and a sale directed of all the property in the receiver's hands. Thereupon the appellant, who is a judgment creditor of the New York & Sea Beach Railway Company, instituted this proceeding for the purpose of having the order appointing the receiver and the judgment of foreclosure and sale so modified as to affect only such property as the mortgagor had when the mortgage was executed.

HATCH, J. The validity of the mortgage is not controverted. But it is claimed that under it no lien was acquired upon the personal property purchased subsequent to its execution, as against the petitioner therein. That the lien should attach to after-acquired property is within the express terms of the mortgage, and it is not disputed that such is its effect as between the parties thereto. By the provisions of the statute (Laws 1850, c. 140, § 28, subd. 10), authority was conferred to mortgage the corporate property and franchises for the purpose of completing, furnishing or operating the railroad. And this authority has been continued in the same language under the revision of the railroad law (Laws 1892, c. 676, § 4, subd. 10). The statute contemplates that it may be necessary to borrow money for the purpose of the physical creation of the road and putting it in operation. It is quite evident that in the accomplishment of this purpose property would be created and acquired that had no actual or potential existence at the time when the loan was made and the mortgage given. It is the usual course of procedure in the construction of a railroad that money is raised by mortgage on its property, and that the structure is built and operated to a large extent by means of the loans thus obtained, and much of the property is created and acquired after the loan is made. The statute makes no distinction between property necessary for the completion and furnishing of the road and that which is essential to its operation. By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired and whether such property be such as is denominated real or personal. So it was early held that such a mortgage created in equity a lien upon property subsequently acquired superior to the lien of a subsequent incumbrance



by mortgage or judgment (*Seymour v. Canandaigua & Niagara Falls R. R. Co.*, 25 Barb. 284; *Benjamin v. Elmira, Jefferson & Canandaigua R. R. Co.*, 49 *id.* 447; *Stevens v. Watson*, 4 Abb. Ct. App. Dec. 302). In those cases the question arose respecting liens upon subsequently acquired real property. But the discussion shows that the court considered the rule applicable as well to personal as to real property. Such has been the uniform rule applied in the Federal courts (*Mitchell v. Winslow*, 2 Story, 630; *Central Trust Co. v. Kneeland*, 138 U. S. 419).

The difficulties which have arisen relate not so much to the recognition of the mortgage as a lien, for the doctrine of the above-cited cases has never been questioned, but rather to the steps necessary to be taken to evidence the lien. The first debate arose over the question whether the rolling stock and equipment of the road retained its character as personal property, and if so, was it requisite that the mortgage should be filed as a mortgage of chattels. The Supreme Court divided upon the question, and decisions were rendered both ways. The Court of Appeals, in *Hoyle v. Plattsburg & Montreal R. R. Co.*, 54 N. Y. 314, settled the question by holding that it was personal property, and that the mortgage covering it must be filed as a mortgage of chattels, as prescribed by the act of 1833, or the same would be void as against the general creditors of the corporation. To meet this conclusion, the Legislature, in 1868, passed an act (Laws of 1868, c. 779), providing that it shall not be necessary to file such mortgage, as a mortgage of chattels when it covers real and personal property and is recorded as a mortgage of real estate in each county in or through which the railroad runs. By this act the status of such property, so far as it relates to liens by way of mortgage is made practically subject to the same rules and is placed upon the same footing as real property. The business carried on by railroads, the great extent of territory which they cover, and the fact that the rolling stock is at all times widely distributed, not only throughout the State through which its lines mainly run, but also throughout the different States of the Union, create an essential difference between it and property whose *situs* is practically fixed. This, coupled with the necessity which exists for certainty of securing to those advancing money, usually in very large amounts, upon the faith of railroad property and the practical difficulty, if not impossibility, of a railroad being able to realize upon its property in this manner, if the technical rules respecting liens upon personal property should obtain, evidently created an intent in the mind of the Legislature to make such property subject to the same rules, so far as practicable, as apply to liens upon real property. It is quite evident that if it should be held necessary to constantly revise such a mortgage, in

order to cover what has been, it may be, purchased by the money advanced or to supply operating needs and replenish what is destroyed, it would render such security so doubtful and precarious as not only to impair, but to practically destroy its value. We can see no reason for drawing a distinction in this regard between real and personal property. On the contrary, as the authority for the mortgage of both is derived from the same source, and the same reasons exist why both should be available and answerable as security, we think it more in harmony with the legislative intent to subject it to the same rules (*N. Y. Security Co. v. Saratoga Gas Co.*, 88 Hun, 569). This view does not bring us in conflict with *R. D. Co. v. Rasey*, 142 N. Y. 570. That case proceeded from the well-settled legal rule that a mortgage of chattels, having no actual or potential existence when the mortgage was given, is void as to intervening creditors. For reasons already stated that rule has no application to a mortgage of this character.

It follows that the order appealed from should be affirmed.¹

Order affirmed.

TAILBY v. THE OFFICIAL RECEIVER.

HOUSE OF LORDS, 1888.

(*L. R. 13 App. Cas. 523.*)

Appeal from a decision of the Court of Appeal.²

By a bill of sale made the 13th of May, 1879, H. G. Izon, described as a packing case manufacturer of 87 Parade, Birmingham, assigned to Tyrell for valuable consideration (*inter alia*) "all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being or which during continuance of this security may be in upon or about the premises of the said mortgagor situate at 87 Parade aforesaid or any other place or places at which during the continuance of this security he may carry on business. . . . And also all the book debts due and owing or which may during the continuance of this security become due and owing to the said mortgagor, which fixtures, stock-in-trade, machinery, furniture, chattels, goods, effects and debts are for the most part and as near as may be mentioned in the respective schedules hereunder written."

Mtge of future book debts this is not confined to one business is valid in equity. No rule about vague recs. Hol. v. Mar. discussed.

¹ Affirmed by the Court of Appeals, on opinion below, 153 N. Y. 670 (1897).

² 18 Q. B. D. 25.—*Rep.*

Earlier Eng cases had insisted that
evidence id not be general. Our case in ef-
fect overrules them. A 2nd case of
same year, 1888, followed the Early Eng
Cases. Otherwise practically no au-
thority for any limitation except
next case. Of course description
must be such as will enable the
property to be identified.

In November, 1884, Tyrrell having died, his executors assigned to Tailby, the present appellant, certain book debts (specified in a schedule) owing to Izon, and among them a debt of about £11 which had become due to him from Wilson Brothers & Co. since the bill of sale, and due notice of this assignment was thereupon given to Wilson Brothers & Co.

In December Izon became bankrupt. In January, 1885, and after the adjudication in bankruptcy Wilson Brothers & Co. paid to Tailby the debt above-mentioned. The official receiver in Izon's bankruptcy afterward sued Tailby in the County Court of Warwickshire for the amount of the debt, as money had and received.

The county court judge gave judgment for the plaintiff on the ground that the assignment of future book debts generally, without any delimitation as to time, place, or amount, was too vague to be supported.

The Queen's Bench Division (Hawkins and Matthew, JJ.) reversed this decision and entered judgment for the defendant.¹ That judgment was reversed by the Court of Appeal (Lord Esher, M. R., Lindley and Lopes, LJJ.) who restored the judgment for the plaintiff.²

Against this judgment Tailby appealed.

LORD MACNAGHTEN.³ The claim of the purchaser was rested on well-known principles. It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.

The position of the purchaser was assailed on one point, and one point only. It was not disputed that Tyrrell gave valuable consideration for the bill of sale, or that Tyrrell's executors were within their rights in selling whatever was comprised in the security. It was not denied that the debt purchased was a book debt which became due and owing to Izon during the continuance of the security, nor was any question raised as to the sufficiency of the notice which the purchaser gave to Messrs. Wilson Brothers & Co.

¹ 17 Q. B. D. 88.—Rep. ² 18 Q. B. D. 25.—Rep.

³ Portions of the opinion are omitted. The opinions of the Lord Chancellor (Herschell) and of Lords Watson and Fitzgerald, LJJ., are also omitted.

J. p. Ref.

*For deft.
For App.
appeal.*

The contention of the learned counsel for the respondent was this: They asserted as a proposition of law that an assignment of future book debts not limited to any specified business is too vague to have any effect. Starting from that proposition they asked your Lordships to come to the conclusion that the assignment of book debts in the present case was void from the beginning as including in its terms book debts which could not be made the subject of valid assignment. I do not stop to consider whether that is a necessary or legitimate conclusion. It is a startling result certainly, and I shall have a word to say about it by-and-by. At present I am merely inquiring whether the original proposition is sound. In the leading judgment in the Court of Appeal it is said that the doctrine which covers the proposition is well established, because "in every one of the cases in point that were cited its existence has been assumed." The principle of the doctrine, however, is not stated; the doctrine itself is not defined; the cases which are supposed to be in point are not reviewed or even named. But the high authority of the learned judges who have adopted this view makes it necessary to examine the matter closely. The learned counsel for the respondent gave your Lordships every assistance that ingenuity and industry could supply; and the result of their labors may fairly be summed up as follows: The origin of the doctrine, modern though it be, is lost in obscurity. Before *Holroyd v. Marshall*, 10 H. L. C. 191, no support for it can be found. Possibly it may be evolved from *Holroyd v. Marshall*. Lopes, L. J., seems to think so. It assumed a definite form in *Belding v. Read*, 3 H. & C. 955. It was recognized by Fry, J., in *In re Count D'Epineuil*, 20 Ch. D. 758, and it received the stamp of authority from what was said or implied by two of the learned judges who decided *Clements v. Matthews*, 11 Q. B. D. 808. No other authority or semblance of authority was produced. My Lords, I have read *Holroyd v. Marshall* many times, and I can discover no trace of the doctrine there. *Belding v. Read*, as Bowen, L. J., points out, was founded upon a misapprehension of Lord Westbury's judgment in *Holroyd v. Marshall*. In *In re Count D'Epineuil*, the learned judge, as he stated in *In re Clarke*, 36 Ch. D. 348, thought himself bound by *Belding v. Read*, and simply followed the decision in that case. As for the order made in *In re Count D'Epineuil*, it seems to me to have been only too favorable to the claimant. I much doubt whether a memorandum like that on which the claimant relied could create a specific lien of any sort or kind. Finally, Cotton, L. J., has himself disclaimed the hidden meaning attributed to his judgment in *Clements v. Matthews*.

So much for authority. What foundation is there for the doctrine apart from authority? The learned counsel for the respon-

dent did not pretend to be wiser than the Court of Appeal. They, too, neither defined the doctrine the aid of which they invoked, nor stated any principle on which it could be supposed to rest. They contented themselves with endeavoring to maintain the proposition that an assignment by a trader of future book debts not confined to a specified business is too vague to be effectual. Why should this be so? If future book debts be assigned, the subject-matter of assignment is capable of being identified as and when the book debts come into existence, whether the description be restricted to a particular business or not. Indeed the restriction may render the task of identification all the more difficult. An energetic tradesman naturally develops and extends his business. One business runs into another, and the line of demarcation is often indistinct and undefined. The linendraper of to-day in the course of a few years may come to be the proprietor of an establishment providing everything that man wants, or woman either, from the cradle to the grave. In such a case I can easily conceive that difficult questions might arise if the book debts assigned were limited to a particular business.

It was admitted by the learned counsel for the respondent, that a trader may assign his future book debts in a specified business. Why should the line be drawn there? Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy? The limit proposed is purely arbitrary, and I think meaningless and unreasonable. The rule laid down by the Court of Appeal would not help to identify or ascertain the subject-matter of the contract in any case. It might have the opposite effect. It would be no benefit to the assignor's general creditors. It might prevent a man from raising money on the credit of his expectations in his existing business—on that which is admitted to be capable of assignment—in consequence of the obvious risk that some alteration in the character of the business might impair or defeat the security.

Under these circumstances I think your Lordships will come to the conclusion that the proposition on which the respondent relies as the foundation of his case cannot be supported on principle, and that the authorities on which it was supposed to rest may be traced to a decision of the Court of Exchequer which itself is founded on an erroneous view of the principles recognized in this House in *Holroyd v. Marshall*.

My Lords, I should wish to say a few words about *Holroyd v. Marshall*, because I am inclined to think that *Belding v. Read* is not the only case in which Lord Westbury's observations have been misunderstood. To understand Lord Westbury's judgment

aright, I think it is necessary to bear in mind the state of the law at the time, and the point to which his Lordship was addressing himself. *Holroyd v. Marshall* laid down no new law, nor did it extend the principles of equity in the slightest degree. Long before *Holroyd v. Marshall* was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust" (*Legard v. Hodges*, 1 Ves. Junr. 478). It had also been determined by the highest tribunals in the country, short of this House—by Lord Lyndhurst as Lord Chancellor in England, and by Sir Edward Sugden as Lord Chancellor in Ireland—that an agreement binding property for valuable consideration had precedence over the claim of a judgment creditor. Some confusion, however, has recently been introduced by a decision of a most eminent judge, who was naturally less familiar with the doctrines of equity than with the principles of common law. In that state of things, in *Holroyd v. Marshall*, in a contest between an equitable assignee and an execution creditor, Stuart, V. C., decided in favor of the equitable assignee. His decision was reversed by Lord Campbell, L. C., in a judgment which seemed to strike at the root of all equitable titles. Lord Campbell did not hold that the equitable assignee obtained no interest in the property the subject of the contract when it came into existence. He held that the equitable assignee did obtain an interest in equity. But at the same time he held that the interest was of such a fugitive character, so shadowy, and so precarious, that it could not stand against the legal title of the execution creditor, without the help of some new act to give it substance and strength. It was to this view, I think, that Lord Westbury addressed himself; and by way of shewing how real and substantial were equitable interests springing from agreements based on valuable consideration, he referred to the doctrines of specific performance, illustrating his argument by examples. One of the examples, perhaps, requires some qualification. That, however, does not affect the argument. The argument is clear and convincing; but it must not be wrested from its purpose. It is difficult to suppose that Lord Westbury intended to lay down as a rule to guide or perplex the Court, that considerations applicable to cases of specific performance, properly so-called,

where the contract is executory, are to be applied to every case of equitable assignment dealing with future property. Lord Selborne has, I think, done good service in pointing out that confusion is sometimes caused by transferring such considerations to questions which arise as to the propriety of the Court requiring something or other to be done in specie (*Wolverhampton and Walsall Railway Company v. London and North Western Railway Company*, Law. Rep. 16 Eq. 433). His Lordship observes that there is some fallacy and ambiguity in the way in which in cases of that kind those words "specific performance," are very frequently used. Greater confusion still, I think, would be caused by transferring considerations applicable to suits for specific performance—involving, as they do, some of the nicest distinctions and most difficult questions that come before the Court—to cases of equitable assignment or specific lien where nothing remains to be done in order to define the rights of the parties, but the Court is merely asked to protect rights completely defined as between the parties to the contract, or to give effect to such rights either by granting an injunction or by appointing a receiver, or by adjudicating on questions between rival claimants.

The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or a measure of the rights created. There are cases where the rights of the parties may be worked out by means of specific performance, though no specific lien is effected by the agreement itself. More frequently a specific lien is effected though no case of specific performance is contemplated. . . .

In the result, therefore, and for the reasons I have given, I am of opinion that the case of the respondent entirely fails. The original proposition is not, I think, well founded. If it were sound the conclusion attempted to be drawn from it could not, as it seems to me, be maintained.

I have, therefore, no hesitation in concurring in the motion which has been proposed.¹

¹ "It is necessary first to consider the principles on which an assignment of property not existing at the time is made effectual. The principle is that such an assignment, as regards the non-existing property, amounts to a contract for value, which a Court of Equity will specifically perform. That was laid down by Lord Westbury in *Holroyd v. Marshall*, and

Order appealed from reversed; order of the Queen's Bench Division restored; the respondent to pay to the appellant his costs in the Court of Appeal and the costs of the appeal in this House; cause remitted to the Queen's Bench Division.

FERGUSON v. WILSON.

SUPREME COURT OF MICHIGAN, DEC., 1899.

(80 N. W. Rep. 1006.)

6 months
 ERROR TO CIRCUIT COURT. Action by James F. Ferguson, as administrator of the estate of Charles Ferguson, against Henry W. Wilson. Judgment for plaintiff and defendant appeals. Affirmed.

The suit was brought in trover to recover the value of certain personal property.

2.¹ Plaintiff's claim to the property in controversy arises: (1) Under a certain chattel mortgage given by one George Wiggins to Charles Ferguson, plaintiff's intestate, on November 1, 1893, the consideration mentioned being \$150, and conveying one bay horse, one gray horse, one binder, one mower, five yearlings, and one calf. (2) Under a chattel mortgage given by Wiggins to Charles Ferguson, October 27, 1893, and filed in the town clerk's office, November 6, 1893, covering all the crops and stock raised on the farm let by Ferguson to Wiggins on that day, and also all the stock, sheep, cattle, hogs, horses, tools, and machinery that might be used or kept on said farm. This chattel mortgage is contained in a lease given by Ferguson to Wiggins for the farm, and to secure the rent

*Inteq. of
 are the spec.
 social prop.
 one may
 acquire is
 in valid.
 must be re-
 lation bet.
 future prop.
 and some
 present prop.*

I should not have gone back to this were it not that there seems to be a misunderstanding as to the application of the doctrine of specific performance in these cases. The ordinary application of the doctrine of specific performance is to compel a vendor or purchaser to complete a contract for sale or purchase, a contract which is wholly executory. Where such a contract relates to goods the Court will not in general decree specific performance. Why is this? Because the Court considers that in general damages are a sufficient remedy, and the proper remedy for the breach of a contract to sell or purchase goods, but that does not apply to a breach of a contract relating to land. In the present case the contract is not wholly executory. The mortgagee has performed his part of it by advancing his money on the faith of it, and the principle that damages are a sufficient remedy does not apply."—*Per* Cotton, L. J., in *In re Clarke, Coombe v. Carter*, 36 Ch. D. 348 (1887).

¹ Only so much of the opinion is given as relates to the point under consideration.

let mortgage to debt 4th '93. covering all personal prop.
Mortgage to plaintiff in Oct Nov. '93. covering specific fall on
farm.

B/sale to plaintiff in Nov '95. covering same.

So debt mortgage prior if available.

Action is at law. In Mich have rule
that mortgage of future property is good at law.
Refuse to allow a mortgage of future prop. if
the future prop. is not of same class or
substituted for present property in some
way. Must not be absolutely genl.
Perhaps all stock to be put on farm
and be good tho' none now there
& farm not mortgaged. Hard to tell.

Seems an unfortunate limitation.
See note to last case.

thereof. (3) Under a bill of sale of all the property described in the two mortgages above mentioned, given by Wiggins to Charles Ferguson, and dated November 6, 1895. The defendant claimed under a chattel mortgage given by Wiggins to him on February 6, 1893, to secure the payment of \$380, payable \$50 each year for six years, and \$80 seven years from date, with interest at 7 per cent. This mortgage covered the binder claimed by plaintiff to be covered by his mortgage and bill of sale, and certain cattle, sheep, crops on the farm, etc.; and also provided that it should cover "all crops, of whatsoever name or nature, to be sown, planted, and grown on said premises during the years 1893 to 1899, inclusive, also all the increase of the above-described stock, and all other personal property which I may own or acquire during said years." This mortgage was prior in time of filing to the mortgage given by Wiggins to plaintiff's intestate, and was duly recorded in the town clerk's office, and renewed from year to year. The real controversy between the parties arises over the interpretation of the clause in defendant's mortgage, "and all other personal property which I may own or acquire during said years." It appeared that Mr. Wiggins was the owner and was in possession of the property described specifically in the mortgage given by him to the defendant. The court instructed the jury substantially that, as to the articles of property specifically mentioned in his mortgage, there could be no question as to defendant's right and title, but that defendant could not claim a lien under the general clause, "and all other personal property which I may own or acquire during said years" upon the property afterwards acquired, and having no connection with the property owned by him at the time of the giving of the mortgage. It is this last part of the charge of which counsel for defendant complains, his contention being that defendant's mortgage was a lien upon all of the after-acquired property.

*Def't's mtge
prior.*

*Lower Ct's
instruction.*

It is conceded by counsel for plaintiff that it is settled in this State that one may mortgage after-acquired property, and the mortgage will be upheld; but it is contended that this rule does not apply to goods and chattels subsequently acquired, which have no connection with property actually in existence at the date of the mortgage. This was undoubtedly the view taken by the court below. The general rule in many of the States is that at common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him, as an incident of other property then in existence and belonging to him; that a mortgage on goods which the mortgagor does not own at the time of making the mortgage, though he may afterwards acquire them, is void in respect to such goods as against subsequent purchasers or

attaching creditors; and the rule in Massachusetts and Missouri and some other States is that, if a mortgage be made of a stock in trade, it will not at law cover additions afterwards made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold (*Barnard v. Eaton*, 2 Cush. 294; *Gregory v. Tavenner*, 38 Mo. App. 627). Cases from other States might be cited where the same rule is laid down. In this State, however, it has many times been held that a mortgage on a dealer's stock may be made to cover after-acquired goods; but it is held that they must be brought within its descriptive words, and a mortgage drawn to cover goods to be "added to" the stock or gotten "for use" in the business will not include goods bargained for, but never received at the place of business, or which, on being received, are devoted to some other purpose (*Curtis v. Wilcox*, 49 Mich. 429, 13 N. W. 803). In *Eddy v. McCall*, 71 Mich. 497, 39 N. W. 734, the property in question covered by the chattel mortgage was certain horses, wagons, etc., and certain mill machinery, lumber, shingles, posts, and other materials in and about the planing mill of the mortgagor. The mortgage contained the following clause: "And also all such other lumber, stock, or material of every kind which they may hereafter add to said business, and all other property which they may hereafter purchase and use in connection with said business." The property was attached by a creditor, and the mortgagee brought trover. It was held that the clause in the mortgage was valid, even as against third parties; citing *Gay v. Bidwell*, 7 Mich. 525; *People v. Bristol*, 35 Mich. 29; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52; *Cigar Co. v. Foster*, 38 Mich. 368; *Curtis v. Wilcox*, 49 Mich. 425, 13 N. W. 803; *Leland v. Collier*, 34 Mich. 418. In no case, however, has this court held that a clause in a chattel mortgage like the one in the present case, to wit, "and all other personal property which I may own or acquire during said years," creates a valid lien upon after-acquired property not connected with the business in which the mortgagor was engaged, as against subsequent good-faith purchasers or attaching creditors, whatever may be the rule as between the parties themselves. The property in controversy here had no relation to that in possession of the mortgagor at the time of giving the mortgage. He did not then own the property, but afterwards acquired it, outside of the business in which he was then engaged. The case is not like the case of *Eddy v. McCall*, *supra*, nor like the case of *Dunn v. Michigan Club*, 115 Mich. 409, 73 N. W. 386. In the last case it appeared that the mortgage covered all the mortgagor's stock in trade, all book accounts, notes, etc., owned by him or appearing on the books of said business then being conducted by him, "and all future book accounts representing the proceeds of sales of goods

in mortgagor's stock, and all additions to the same." It was held that this covered all future book accounts, though not entered on the books. The court below was not in error in the charge as given. The judgment must be affirmed. The other justices concurred.

Take cases on pp. 24 & 25
at beginning of this section.

CHAPTER I. (Continued.)

SECTION III. INFORMAL MORTGAGES.

RUSSEL v. RUSSEL.

COURT OF CHANCERY, 1783.

(1 Brown Ch. 269.)

Facts.

A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate. *Delivery of lease under oral agreement that it shall be held as security, creates an equitable mortgage.*

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the 4th clause of the Statute of Frauds.

LORD LOUGHBOROUGH. In this case it is a delivery of the title to the plaintiff for a valuable consideration. The court has nothing to do but to supply the legal formalities. In all these cases the contract is not to be performed, but is executed.

LORD ASHURST. Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered. *Does mortgage go into lease as tenant or as vendor.*

whether intended
intention.

A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security.¹

¹ "The case of *Russel v. Russel* is a decision much to be lamented; that a mere deposit of deeds shall be considered as evidence of an agreement to make a mortgage. That decision has led to discussion upon the truth and probability of evidence which the very object of the Statute of Frauds was entirely to exclude."—Eldon, L. Ch., in *Ex parte Haigh*, 14 Ves. 402. Compare *Ex parte Hooper*, 1 Meriv. 7.

Rockwell v. Hobby, 2 Sandf. Ch. (N. Y.) 9 (1844); *Hackett v. Reynolds*,

Brown, St. Frds. § 62 admits that doctrine of our case is settled in Eng. & that it is squarely contrary to the St. Frds. Very little authority for it in U.S. In Eng. some sense since no registry laws & title deeds the only ev. of title often. In Am. that not true too rule wd have little sense independent of objection to it on grd of St. Frds.

~~For dif. forms of Equit. outgoes. see note app. p. 54.~~

Generally it is § 4 of St. Frds. forbidding contract or sale of lands but that is relied on as making deposit ineffectual. But of course it is a little hard to call a mortgage a contract to sell or a sale of land. It is rather a transfer of an uncertain interest in land & so might be held bad under § 1 of St. Frds. which turns all such into leases at will of lessor.

Arguments of Ch. not sound. Loughborough says it is like supplying formality of livery & seisin or lack of seal or like. Would make St. Frds. inapplicable to mortgages. Can only meet argument by considering the policy on which St. Frds. is based as stronger than that requiring seal, livery, or like. The policy of St. Frds. is perhaps more modern any. how. And in lieu states where mortgage does not pass title some of the "formalities" are rather survivals of a time when it did. Ashurst not so sound. In Kruder case he means that if Kruder enters he may be entering as Kruder or as tenant & that can show which by oral evd. Doesn't violate St. Sale of land is in writing - don't have to have delivery of pos to Kruder in writing, nor do short term leases have to be in writing (Syn under reg. St.)

Granting that deposit of deeds makes a
mortgage as Ct had to, our case seems sen-
sible. Question is can mortgage be made to
run to new parties, as in our case, or to
cover new debts too. a delivery back of
deeds & a redelivery. That seems a
useless formality if agreement to change
purpose of deposit is made out. [If no
agreement cannot extend equitable mortgage:
that is, law will not extend it to all
future debts. This up later.]

But what are exact facts? Suppose between
1st deposit & new agreement a third party
got an equity in property. Would that be
subject to whole equity mortgage or only to
that part which was prior? No authority
but clearly in principle the latter. ~~See~~ said.

If delivery back & then re-delivery
the equity mortgage wd seem to date from
re-delivery & all be subject to the other
equity - just supposed. But query? A
question of extension of mortgages up later.

Note my deposit in our case was for
future advances, so? as to whether fur-
ther advances cd be tacked by parol
agreement didn't arise. Can by case - card.

Note also that this was in effect
a bill to foreclose. But does not fol-
low that Ct considered it all one mortgage
as bill may have prayed foreclosure on
of two mortgages. Where bill to foreclose
a written ^{debt} mortgage & then plaintiff tries to add
further advances, they may be cut out
on ground that bill not framed for fore-
closing an equity mortgage.

Also opposing parties are creditors or as-
signees in bankruptcy too not B. F. P's.

Bankrupt, before bankruptcy, made a deposit of deeds as security with his bankers, Moffatt, Kensington, Styau. He gave a bond to
 EX PARTE KENSINGTON. *same for repayment*

COURT OF CHANCERY, 1813.

(2 V. & B. 79.)

Purpose of an Equi. Mgt. may be changed by oral agree- ment without re-delivery.
 Duncan Hunter, on the 19th of March, 1805, deposited with the petitioners, his bankers, several deeds; and signed the following memorandum, addressed to Messrs. Moffatt, Kensington & Styau, bankers, London. "London, 19th March, 1805. Gentlemen, herewith I beg leave to deposit in your house the deeds and policy of assurance upon the following leasehold property;" (describing it) "to remain with you as a collateral security for the balance of any sum or sums of money which you may at any time advance for my account, and which I hereby oblige myself, heirs, or executors, to assign in a legal manner whenever required so to do."

It is a to St 21 Jac I. no value to day since no such clause in present act. Any how is bankruptcy question.
 On the 25th of September, 1805, Hunter executed a bond to the same persons, in the penalty of £40,000, with condition for payment to them, and in case of any alteration taking place in their firm, then to the persons composing a new firm, if comprising two of the original members, of all sums thereafter in any manner lent unto or advanced on account of said Duncan Hunter by the petitioners.

In December following, Moffatt retired from the partnership. On the 6th of August, 1807, Hunter, requiring additional advances, deposited with the petitioners the title deeds of an estate, called Cromwell Park; and on the 7th of August signed the following memorandum. "Messrs. Kensington & Co. Gentlemen, I hereby deposit in your hands the title deeds which I hold of Cromwell Park, as a collateral security for any cash transactions which I have had or may have with your house, and which I agree to assign whenever I am required so to do. London, 7 Aug., 1807."

In March, 1809, Hunter, wanting further advances, proposed a deposit of other deeds, of premises held under the Drapers' Company, by lease, at a rent of £400 a year, and agreed to assign to the petitioners his interest in £3000 3 per cent. Consolidated Bank

4 R. I. 512 (1857); *Griffin v. Griffin*, 18 N. J. Eq. 104 (1866); *Gale v. Morris*, 29 N. J. Eq. 222 (1878), accord. Contra are *Shitz v. Dieffenbach*, 3 Pa. St. 233 (1846); *Meador v. Meador*, 3 Heisk. (Tenn.) 562 (1871). The cases in the United States are few and it may be doubted if the doctrine will have much following here. In several Western States the deposit of School Land Certificates, which pass title by assignment, has been held to create an equitable lien. See *Mowry v. Wood*, 12 Wis. 413 (1860); *Jarvis v. Dutcher*, 16 Wis. 307 (1862).

12 his. Was St authorizing assignment & an assignment in writing.

16 his. Max dictum.

4 R. 9. Square in pt.

18 N. J. Eq. Refused to make duplicate give up deeds & dictum.
 no " Returned a note to make it good & dictum.

dropped out of firm. There was further deposit with new firm. Held that was suff. ev. of intent to have new firm satisfied to so. Only on the 1st deed. Had not to return to mortgage & re-delivery.

~~Samuel Hunter & Drapers Co. were trustees of the stock (annuities) & Hunter was one of the petitioners. Then Hunter deposited it with petitioners as security that he will pay rent 150 marks lease with something that equity judge in lease will be valuable to petitioners.~~ →

CONVEYANCE. [CHAP. I.]
Annuities, invested in the names of the Drapers' Company and him, the said D. Hunter, for securing the due payment of the said rent of £400 and performance of the covenants of the lease; and he signed the following memorandum: "London, 30th March, 1809. Messrs. Kensington, Styan & Adams. I have lodged in your hands the lease and other deeds belonging to the Old Stock Exchange, which are to lay as a collateral security for any advances which you may make for my account, and which I hereby engage and promise to assign over to you, in the regular way, when required, as also £3000 3 per cent. Consols. which are deposited in my name, with that of the Drapers' Company, as a security for the ground rent, and which I hereby acknowledge are also to be transferred or assigned over to you when required."

So in effect
bill to fore-
close.

No further assignments or transfers were made. In July, 1811, Hunter was declared a bankrupt; when, a considerable balance being due to the petitioners, and their application, as mortgagees, for a sale under the general order being rejected by the commissioners, the petition was presented, praying a declaration that the petitioners are to be considered as mortgagees of the estates and the £3000 3 per Cents.; that the commissioners may take an account of the principal and interest due to the petitioners and appoint a sale of the mortgaged premises and the bankrupt's interest in the £3000 stock, and that the moneys to arise from the sales may be applied in reduction of the petitioners' debt, with liberty to prove for the remainder.

Sir Samuel Romilly and Mr. Wilson, in support of the Petition. The questions are, whether this deposit of title deeds, with a written agreement, can be held by the petitioners as a security for advances after Moffatt retired: secondly, as to the bank annuities. Your Lordship has gone much further in decision than these circumstances, having held a mutual understanding, with reference to securities in the hands of the creditor, sufficient without any express agreement: *Ex parte Langston*, 17 Ves. 227; 1 Rose, 26, which has been followed in many instances.

The stock cannot be brought within the statute of James I.¹ It is not like a personal chattel, passing by delivery: being in truth a chose in action. The bank would not take notice of any trust. To whom was notice to be given? The bank are not the debtors for bank annuities; if, therefore, notice was necessary, it must be given to Government. Is stock, standing in several names, to be considered as the stock of one becoming bankrupt? The effect as to transfers in marriage settlements must be considered. If, however, it could be considered within the statute, that cannot be under these circumstances.

¹ Stat. 21 Jam. 1, c. 19, s. 11.—Rep.

Provided that goods in the order or disposition of a bankrupt shall be subject to the Commission.

Seems Hunter has lease from Drapers Co & deposited
Consols with D. Co. to secure payment of rent to
D. Co. He ~~promised~~ to deposit lease & prom.
to assign Consols when required. The
Consols (Consolidated Bank Annuities) were
held in name of Hunter & Drapers Co.
in trust for Drapers Co. to secure them
as to rent & residue in trust for
Hunter. A trust deed arrangement.

Mr. Leach and Mr. Montague, for the Assignees. Here is no agreement that this deposit, in March, 1805, should be a security to the new house, formed afterward by a change of the firm. At least there must be a clear verbal contract. Here is no written agreement and no verbal contract of any description.

The stock is within the statute of James I. The books are the best evidence of the apparent ownership.

THE LORD CHANCELLOR [ELDON]. It has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that, whatever I might have thought originally, I must act upon that as settled law. I have often expressed my surprise how it came to be so settled; as judicial decisions are to be found, that a lien upon deeds may exist, without giving any right at law to the estate; and there is a remarkable case in Peere Williams, where a prior encumbrancer was held to have the interest in the estate: but the Court would not take away the deeds from a subsequent encumbrancer; allowing all the benefit he could have from those deeds, but giving him no interest in the estate. That decision, however, of *Russel v. Russel*, by Lord Thurlow, has been followed ever since (1 Bro. C. C. 269).

This is the case, not of a mere deposit, but a deposit with a written agreement; which must *primâ facie* determine the purpose of the deposit; and it would be stretching the expression much to construe that as an engagement that would affect the deeds, not only with regard to the money advanced by the old house, but the advances afterward to be made by the house, whenever the partners should be changed. It must therefore be considered as having been originally only a collateral security for any money that might become due from the house, while the partners remained the same.

as to that deposit.

In the cases alluded to, I went the length of stating that where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement; and this distinction appeared to me to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases.

Can change into m. & delivery.

In this case a bond was given, dated the 25th of September, 1805; at which time they stood with a written contract, affecting these deeds and the estate only to the extent in which Moffatt & Co. should make advances, but with a written contract, arising from the bond, for a personal obligation for the advances, not only of that partnership, but of any other, of which two of the original mem-

bers constituted part. Moffatt retired from the partnership in December following; and this considerable difficulty occurs in the case. [Understanding alone, unless in a fair sense amounting to agreement, would not do; and in this case no two of their agreements would admit the same construction. My opinion, however, is, that, if upon the affidavit and examination, taken together, aided by the extreme probability of their intention, I can collect that what was originally deposited for one purpose should be held as deposited also for the other, with reference to the demand of the subsequent partners, that, though by parol, would be sufficient within these cases.]

Upon the other question, with regard to the stock, my opinion is extremely clear. When that stock was placed in the hands of Hunter & Co. it was upon a trust, which must exist as long as the lease, to which the agreement refers. The equitable interest was in different persons; one being both trustee and *cestui que trust*. I do not apprehend that the bank would take notice of an agreement to transfer. The bankrupt therefore having only an equitable interest, and no power to make an actual transfer, his equitable interest passed by the agreement, without the legal interest, which he could not part with.

So not within
St. Tru. 2/ Jac. I.

Equit. int. may not in disposition of bankrupt
So not within 2/ Jac. I.

cd not part with legal int as one trustee could act for both.

Jan. 6, 1910.

Legal intge of leasehold. Then a further advance on a bond agreement that it
EX PARTE HOOPER.

shd be attached to intge.
Held no good. That COURT OF CHANCERY, 1815.

assignees in bank mptcy (1 Meriv. 7.)

Assignment by the bankrupts, of leasehold premises, by way of legal intge mortgage, for securing the sum of £400 and interest. Cannot be so altered by parol
The bankrupts subsequently becoming indebted to the mortgagee in further sums received by them for his use, an account was as to cover stated and settled between the parties, on which a balance of £400 later advances, was ascertained, and the following memorandum delivered: not mentioned in intge.
"Hewett and Hopkins, debtors, to Mr. J. Ford, £400 on balance
Extending it of account due the 12th day of June, 1813."

by subsequent The bankrupts farther entered into a parol engagement that the last mentioned £400 should be tacked to the original mortgage; and that as soon as a new lease of the premises could be obtained, a mortgage security for the same should be executed by the bankrupts; but which, owing to the renewal not having been obtained, was never done. Interest was paid on both sums to the 12th of these settled pts. But this is legal intge & rule of extending by parol will not be carried further so as to apply to it.

specific conveyance is a suff. writing to comply with st. probably. If cases holding deed can be reformed so as to convey more than it does in unreformed state.

Written Contract for mortgage in favor of St. Trds 180 good.

next case. But if mortgagor comes into Equity to redeem he will be compelled to do Equity by paying all debts that he has ever orally agreed the mortgagee should receive. [But he will not be compelled to pay debts as to which he has made no such agreement. Up later.]

next case. Again suppose mortgagor asks equity to declare an absolute deed a mortgagee he must do equity by paying all debts which he orally & subsequent to deed has agreed it should stand for.

Can't apply same argument as in case of deposit. There the depositing is the important thing & returning deeds for a redelivery and not make any better a deposit. So if credit subseq. broken & one who gets it by writing is already in pos. he need not make any writing to get title. But where mortgage is in writing the new writing will add to the evidence of the mortgage & to its certainty & to the showing that it is not a trumped up affair.

June, 1814; and on the 8th of December following the commission issued.

The petition prayed a sale of the mortgaged premises, and that, after applying £800 in liquidation of the debt, the residue might be proved; with the usual directions. The single point before the court was, whether or not the petitioners were entitled to tack on the second £400 debt to their mortgage security.

*So no bill
to preclude
in effect.*

The petition came on to be heard before the long vacation, when the Chancellor, having expressed himself adverse to the prayer, it was requested that it might stand over, and was this day re-argued.

Fonblanque, in support of the petition, compared this to the cases of part performance of agreement to purchase; and, contending that the advance of the £400, in this instance, was such an act of part performance by the testator, referred to *Clinan v. Cooke*, 1 Sch. & Lef. 22, before Lord Redesdale, and the case cited in note, p. 40, to the report of that case, for the rule that, where the whole sum contracted for is paid, that is such a part performance by the vendee as to take the case out of the statute; but not, where only a part. That, in the case of an equitable mortgage, the deposit operates as a lien by reason of the implied agreement.

Montagu, on the same side, referred to the case *Ex parte Langston*, 17 Ves. 227; 1 Rose, 26, as deciding the present, on the ground that an equitable mortgage by deposit of title-deeds must be held to cover subsequent advances, on evidence that they were made upon that security. If the deed had been delivered up, and returned at the time of making the subsequent advance, this would have been clearly an equitable mortgage.

Hart for the assignees.

THE LORD CHANCELLOR [ELDON]. There is an evident distinction between the cases of loan and purchase; and without expressing any opinion on the question, whether in the former case, payment of the whole, or of part of the purchase money, is, or is not, a part performance to take it out of the statute, it is enough to say that the advance of money upon a contract for loan affords, of necessity, no evidence of any intention but that of creating the relation of debtor and creditor.

The doctrine of equitable mortgage by deposit of title-deeds has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted of extending the original doctrine so as to make the deposit a security for subsequent advances. At all events, that doctrine is not to be further enlarged. In the present case, the legal estate has been assigned by way of mortgage. The mortgagee is not entitled to say, "I

hold this conveyance as a deposit," because the contract under which he holds it is a contract for conveyance only, and not for deposit. The subsequent memorandum in writing creates nothing more than a debt by simple contract, and cannot be added to by parol.

The cases on this subject have gone too far already; and I would be understood as saying that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction.

at time of orig. mtge?

The petition dismissed with liberty to file a bill.

Spicer gave ~~plff~~ def't a mtge for Scott to secure land for that amt. Later def't advanced 1800 more which was added to bond & parties mutually agreed that mtge shd cover this also. Plff later got a mtge from Spicer with full knowledge of def't. STODDARD v. HART. def't - appellant.

decided land to COURT OF APPEALS OF NEW YORK, 1861.

1861. Def't who proceeded (23 N. Y. 556.)

to preserve his mtge by advertisement. Appeal from Supreme Court. The action was to restrain the foreclosure by advertisement, and to compel the cancellation of a mortgage held by the appellant against one Spicer. The trial was before a referee, who found these facts: On the 4th of March, 1852, Spicer procured from the defendant, on the security of the bond and mortgage in question, an advance of \$200 on lumber to be thereafter furnished. The mortgage was recorded on the 8th of March, 1852.

Lu N. Y. legal mtge creates only lien, and extrinsic agreement that it shall differ from it expressed terms is ineffectual at law. Such an agreement possibly enforced in equity, but more understanding that mtge. would cover future advances cannot be given effect to.

Held for plff. The original condition of the bond and mortgage was for the payment of \$200 and interest on the 15th of June, 1852. At the time the \$200 was advanced, it was agreed between the parties that if Spicer should want more money, the defendant would advance it, and for the purpose of securing it, the amount of such further advance should be inserted in the bond, with the parol agreement that the mortgage should be considered as security for what was thus inserted. Accordingly, within ten days after the mortgage was given, Spicer applied for and obtained from the defendant a further advance of \$180, inserting at the same time in the bond a further condition for the payment of that amount, with interest, on the 1st of June, 1852. The mortgage, which had been in the meantime recorded, was conditioned for the payment of \$200 and interest, with the additional clause: "According to the condition of a certain bond obligatory bearing even date herewith."

On the 12th of July following, Spicer was indebted to the respondent, Stoddard, in the sum of \$500, for rent due and to become due, and with full and specific information from Spicer of

discharged that, so power of sale gone. Yet def't will not be enjoined if plff hasn't done equity. Rent def't has no equity to a lien on prop. for the 1800. Eg. and Spicer suppose a court to give mtge perhaps, but was none. Eg. will reform if mistake but no mistake except as to legal effect of inserting in bond & not shown that any mistake as to that. Seems

(1) Argument that mtge necessarily secures entire debt of bond of course unavailing as Ct held.

(2) Notion that when mtge covers title it is easier to make 2nd good is unavailing.

That was? in our last case. It is then a mtge of Eq. redemption & that is int in land within Statute. If as in N.Y. is to create a 2nd legal lien that also within St.

(3) Another qd on which here agreed & held bad is ~~the~~ Parol Ev. rule. It was contemporaneous with orig. mtge & so merged in it. But perhaps on all the facts

could say that the agreement was renewed when advance & addition to bond made. If so parol ev. rule no obj. as that does not apply to subseq. agreements.

So, ^{because of St. Prds} no equt or legal mtge as to the 1800.

Yet was oral agreement that 1800 shd be considered secured. And pty is seeking aid of equity. Why shdnt he do equity?

Ct say:

(1) Was no agreement to make any further mtge. But was agreement that present mtge shd secure the \$180 in addition. In the other cases where Eq. has compelled one redeeming to pay all debt which he has agreed mtge shall secure, ~~there~~ was no agreement to make any further mtge. So this argument of Ct seems unavailing.

(2) Ct say ^{defy} ~~that~~ cannot ask reformation. Prob. that is true. Very doubtful if instrument will be reformed where parties make mistake of law. Clearly will not where they choose a particular form of instrument ~~there~~ Error in law. But anyhow mistake must be clearly made out or not here. Perhaps as Ct said

Possibly O.K. but see 1st rule as to discharge of debt post under future advances.

Ct. imply that 5% int. not in any then, i.e. if agreement to make mtge, but that unavailing.

no mistake as to effect of putting it in bond, but they relied on oral agreement to effectuate their intentions. ^{But the no information yet they must do eq. In other case where compelled to do equity information is not allowed or asked.}

So seems that since was agreement to tack the 180\$ to utge that ~~pltf~~ shd have been compelled to do equity by paying that. If however it is con. sidered as a purely contemporaneous agreement perhaps parol ev. rule shd ~~the~~ exclude its use even for this purpose. It clearly wd exclude it for purposes of affecting main utge or of bring set up as a separate utge.

~~But~~ seems argument that agreement was renewed is weak, that agreement was really contemporaneous ~~to be~~ ~~allowed to be used for any purpose to so case O.K.~~ But if pltf must do equity by performing agreement within St. Fds. why not those within parol ev. rule also. Seem case wrong. Wright contra. Also see rule that a utger seeking aid of eq. to have ab. deed declared a utge must do same thing — i.e. pay all debts he has agreed utge shall stand for.

^{Right wrong}
~~Can't even support case~~ on ground that pltf was a stranger to dealings between Spicer & deft. So can't rely on statute of frauds. Truly 3rd parties & creditors can't rely on St. But one who has succeeded to the interest of a party who cd set up statute may also set up St. Thus heir can, grantee can, lessee can. Query if utger cd. But pltf was a grantee after bring utge. ~~But? is not whether pltf can rely on St. but whether deft~~

But tho Spicer would have had to do Equity, does it follow that pltf must? Seem little authority.

in other not good as case but in plenty of other cases this one.

all the foregoing facts, Stoddard took a subsequent mortgage on the premises for the amount of his debt; and afterwards, in January, 1853, he obtained from Spicer a deed of the property, which was received in satisfaction of his mortgage.

On the 25th of February, 1853, the defendant commenced a foreclosure by advertisement, claiming the amount due to be \$380, with interest. The plaintiff, on the 1st of March, tendered as the amount due, the sum of \$200, with interest and costs, and demanded a satisfaction piece, which the defendant refused. The referee decided that the defendant had no lien on the premises except for the \$200 and interest, and that the mortgage should be cancelled on payment of that amount, with costs.

The judgment entered upon the referee's report was affirmed on appeal at general term in the Eighth District, and the defendant appealed to this court.

John K. Porter for the appellant.

E. Peshine Smith for the respondent.

COMSTOCK, Ch. J. In a loose and general sense the equity of this case is on the side of the defendant, because he made the subsequent advance of \$180, it being agreed that this, as well as the original sum of \$200, should be considered as secured by the mortgage. The question, however, is, whether the rules of law will give that effect to the transaction.

It will be convenient first to determine the legal construction and effect of the mortgage, unaided by the parol facts, but read in connection with the bond to which it is collateral. On the part of the defendant it is contended that the two instruments, constituting, as they do, a single security, are to be read as one; and, therefore, that the new advance, being written in the condition of the bond, is ~~to~~ to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the extrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for \$2000 actually loaned, and a mortgage collateral thereto be given for \$1000, the latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, of specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt; the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the

"Satisfaction piece" is a writing stating that satisfaction has been received usually of a judgment.

OK.
personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specially pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay the \$200, and the further sum of \$180; while that of the mortgage is only to pay the \$200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

cf. but case.
In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagor or any one claiming under him not having the rights of *bona fide* purchasers. The title being conveyed by the instrument, the equities of the parties might be adjusted or modified by any new agreement without a writing. But it is entirely settled with us that such is not the nature or effect of a mortgage. With us a mortgage is a lien or security only, and not in any sense a title (*Kortright v. Cady*, 21 N. Y. 343, and cases cited). This ground of sustaining the defendant's lien for the additional advance, therefore, cannot be maintained. The defendant has no title to the land in question; and we have already seen that he has no legal mortgage for a greater sum than \$200.

At the commencement of this suit the defendant was proceeding to foreclose his mortgage, by advertising to sell the premises under the power of sale contained in the instrument; and he claimed in his notice both the sums of money in question. The plaintiff, before instituting the suit, tendered the sum of \$200 secured by the mortgage, according to its terms, with the interest, and the costs which had accrued. From what has been said, it follows that this tender extinguished the lien and the power of sale, and that a sale afterwards made under the power would be a nullity (*Kortright v. Cady, supra*). Of course, we now speak of the lien as a legal one, expressed in the mortgage, and having no other existence.

It is claimed, however, that the defendant acquired some equitable lien or right to charge the new advance upon the land, and that, although such a lien or right cannot be enforced in the manner attempted, because there is no legal power of sale to enforce it,

Clearly a B.F.P. from utgor should not have to do
Equity. Nor should a subseq. utgee, unless he
knew of oral agreement, as he is a B.F.P. in
effect. Attaching Creditor is less easy of
solution. If the Oblig. to do eq. really creates
a sort of Equit. lien then of course an attach.
Cred. wd take subject to it. But seems it
doesn't. On foreclosure utgee can only hold
utgee for debt really secured by it not count.
up oral agreement. So seems attaching
Cred probably wd. not have to do eq. as a
Cred of redeeming - it is equity that his
debt be paid ratably. But a Grantor of eq.
with full knowledge of oral agreement, it
seems shd. do equity. He is ~~likely~~ ^{likely} to have
given less for his interest on 1/2 of this
claim vs land & if so, he clearly shd pay
it as a Cred. of redeeming. To hold other-
wise wd induce insolvent utgor to convey
Eq. with the idea of getting rid of this extra
charge vs land. So case seems un-
supported even on this line of reasoning
~~which was not noticed at all by Ct. by fact~~
that plff is not orig. utgor who ~~was~~ ^{owns} the extra
sum.

yet, as the plaintiff asks the interference of a court of equity, he must do all that equity requires as the condition of relief; in other words, he must offer to pay the whole debt in specie to the plaintiff. The argument may be sound if the defendant did acquire any such equitable title or right; and this is the next subject of inquiry.

In England it has long been held that a deposit of title deeds by a debtor with his creditor is evidence of a valid agreement to give a mortgage, which agreement is enforced by treating the transaction as an equitable mortgage. It has always been admitted by English jurists that this doctrine contravenes the statute of frauds, although it has become well settled in the jurisprudence of that country (4 Kent. Com. 151). It is confined there to the precise case of a deposit of title deeds. A mere parol agreement to make a mortgage, or to deposit deeds, does not create an equitable lien. In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner. Equity, however, here as well as there, does sometimes specifically enforce parol agreements which are within the statute of frauds; and I see no reason to doubt that such an agreement to make a mortgage may be enforced when money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse the relief. But, in the present case, the precise difficulty is in the absence of any such agreement. The defendant had loaned \$200, and held a mortgage for that amount. He then advanced another sum: but there was no agreement to make another mortgage, or to change, in any respect, the terms of the one already made. The additional sum was inserted in the bond, with an understanding thereby that the mortgage should be "considered" as a security for that sum also. The instrument, as it was made, was a plain security for \$200; and no change in its terms was contemplated. Nor is there the least pretence that any writing was to be executed creating a special security for the new advance. Now, a loan of money, with a mere understanding that the land of the borrower is a security for the debt, does not create a mortgage, legal or equitable. If it be specifically agreed to execute a legal mortgage, a very different question arises. The deposit of title deeds is evidence of such an agreement. But here there was no agreement to do anything which was not actually done. Consequently, if enough was not done to create a mortgage, then none was created. There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did; but nothing in the transaction was left unfinished of which equity can now decree the complete execution. The question, then, is upon the legal inter-

?

So and not let St. & sh stand in way. So rather too lenient as to that.

Shows there was agreement that note shd cover extra sum.

? Suppose note intended but document in exp. to convey title, Equity will fix it.

pretation and effect of the acts done, which, as we have seen, failed to create a lien. The understanding and belief of the parties do not change the law.

For analogous reasons I do not see that the defendant can derive any aid from the doctrine of reforming contracts in equity.^{Ev.} If a writing does not truly express the agreement of the parties; if anything was omitted which was agreed to be inserted; or if anything be inserted contrary to their intention, equity will relieve against the mistake by reforming the contract. But in this case no mistake is alleged or proved. Everything agreed upon was done. The subsequent advance of money was to be inserted in the condition of the bond, and it was inserted accordingly. There was no agreement to make a new mortgage, or to change the terms of the existing. It is said the understanding of the parties was that the mortgage should secure this advance also; but it is not pretended that this understanding was to be expressed in any form of writing. If A. should loan money to B., and take a bond with the understanding that the farm of the latter should be considered a security, but with no intention or agreement to make a mortgage or writing of any sort, as the law requires, in order to create a lien, none would be created at law or in equity. The transaction, in judgment of law, would amount simply to a loan upon the bond of the borrower. Such, I think, in substance, was the transaction in question. There was no mistake, unless it be in misunderstanding the legal effect of what was said and done. But even this is not alleged. It is not stated or proved that the parties believed or understood that the insertion of the new loan in the bond had the effect in law of enlarging the mortgage also.

Will a court of equity, then, make a new contract for parties in order to effectuate a mere understanding where no agreement is pretended different from the one which the writing already expresses, and where there are no circumstances of surprise, imposition, fraud or misplaced confidence? To do so, I think, would be taking a step in advance of the settled rule on the subject, especially if the relief sought be in direct opposition to the statute of frauds. In the case of *Hunt v. Rousmaniere's Executors*, 1 Peters, 1, the general intention of the parties was to effect a security upon a ship at sea equivalent to a mortgage or bill of sale. With that design, a power of attorney to sell was executed, which, as they understood and were advised, accomplished the object in view. As a power merely, the instrument was revoked by the death of the party who signed it, and a bill was filed to reform the writing so that it might stand as a security according to the intention. It was adjudged, in the Supreme Court of the United States, upon the fullest consideration, that the bill could not be

to
ge.
the
fid
w

the
we.
one
s.
k
t

An oral or written release of a note cannot
revive it. The most it can do is to create
an equitable note, & that is N.Y. vs. a B.F.P.
That is main qd. It goes on.

Was Release a B.F.P.? Yes. He had notice
of course of the orig. note & took subject to
that. But it was pd. & not to be revived.
He had no notice of the Equit. note, if any,
created by its release. Might be argued that
fact that orig. note was not discharged of re-
cord wd put him on inquiry as to why
not. But that wd only lead him to see
if it was pd. It wd be mere accident
if in discovering it was paid he shd also
discover that it was afterwards released.

But oral release is not a good equi-
table note. St. Frds is in the way here as
in case. But the not good as an
Equit. note, Equity might compel its pay-
ment before aiding notor. & this oblig. to do eq. rd
from bind. grantee of note. With notice as we have seen.
A release with written statement that is
for a new amt shd be held a good Equit.
note.

Sometimes Estoppel may prevent one
who releases, setting up the discharge.

maintained—the ground of decision being that the court could not make an agreement of a different tenor and effect from the one which the parties themselves had intentionally entered into. The case before us seems to me still weaker in its circumstances, because not only was there no agreement for a better security than the defendant actually received, but it does not even appear that he acted under any mistake as to the legal effect of the transaction. The new advance of money was inserted in the bond; but there is no pretence of a belief that this in any respect affected the mortgage. There was a parol agreement that the mortgage should be considered as a security also for the sum thus inserted. The other party might give effect to this agreement in any suit or proceeding against him to foreclose, if he voluntarily chose to do so. But it is not alleged that, under a mistake even of the law, this agreement was supposed to be of any binding force or effect. On the whole, I am of opinion that the defendant's lien, whether viewed at law or equity, was only for the original sum of \$200, and, consequently, that the judgment of the court below is right.

Davies and Mason, JJ., dissented; Hoyt, J., did not sit in the case.

Judgment affirmed.¹ Strike gave note to Bliss, recorded, after which he had but satisfaction not recorded. Strike releases this note to Robert, who keeps it & p.d. Later Strike makes note to Bliss who has no notice except by record of former note.

BOGERT V. BLISS AND ROBERT. *Held for Bliss. Rev. COURT OF APPEALS OF NEW YORK, 1896. not release a satisfied note. May not suit to new equity note but that N.Y. vs.*
(148 N. Y. 194.)

Re-issuance of ~ Appeal from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 3, 1895, which reversed an order of Special Term confirming the report of a referee in proceedings for the distribution of surplus moneys arising from the sale of mortgaged premises in an action of foreclosure, modified and confirmed as modified said report, by finding that the equities of the claimant Bliss were superior to those of the claimant Robert; that the lien of the deed or mortgage to the claimant Bliss was superior to any claim of the claimant Robert, and that the defendant Bliss was entitled to payment out of the surplus moneys, the balance, if any, to be paid to the defendant Robert.

Bliss who had no notice of the release. St. Fred. requires a writing. None here. To re-issue and be eminent Clear for fraud.

Re-issuance of ~ Appeal from order of the General Term of the Court of Common Pleas for the city and county of New York, made June 3, 1895, which reversed an order of Special Term confirming the report of a referee in proceedings for the distribution of surplus moneys arising from the sale of mortgaged premises in an action of foreclosure, modified and confirmed as modified said report, by finding that the equities of the claimant Bliss were superior to those of the claimant Robert; that the lien of the deed or mortgage to the claimant Bliss was superior to any claim of the claimant Robert, and that the defendant Bliss was entitled to payment out of the surplus moneys, the balance, if any, to be paid to the defendant Robert.

The invalid under the statute of frauds.

¹ Where the extension of the mortgage security is in writing, see *Butts v. Broughton*, 72 Ala. 294 (1882). *Held good in acc. with genl rule.*

The facts, so far as material, are stated in the opinion. . . .

ANDREWS, Ch. J. The controversy relates to the disposition of surplus moneys arising on a foreclosure of a mortgage. One Robert claims a prior lien thereon as assignee of a mortgage made by the defendant Striker to one Weil, dated May 15, 1891, payable June 18, 1891, for \$1000, recorded May 18, 1891. The mortgage was paid at maturity by Striker, the mortgagor and owner of the equity of redemption, to Weil, the mortgagee, who on the same day executed and delivered to Striker a satisfaction of the mortgage, together with the bond, but the mortgage was then in the register's office and for that reason was not delivered to Striker. The mortgage was paid in usual course, and at the time of the payment there was, so far as appears, no intention on the part of Striker, and no understanding between him and the mortgagee, that the mortgage should be kept alive. Subsequently, on July 2d, 1891, Striker applied to Robert (a partner of Weil) for a loan of \$1000, on the security of this extinguished mortgage, and the loan was made, Striker delivering to Robert at the time the bond and the satisfaction, and stating that Weil would assign the mortgage to him. The assignment was subsequently made, but not as we infer until after the mortgage executed to Bliss, the other claimant of the surplus. The Bliss mortgage was executed by Striker to Bliss August 28th, 1891, and covered the same premises embraced in the Weil mortgage, and was given to secure a loan of \$1500 made by Bliss to Striker, but in form was an absolute deed, and was recorded November 11th, 1891. Bliss when he took his mortgage made no search of the title and had constructive notice only of the Weil mortgage. The question is whether Robert or Bliss is entitled to the surplus moneys. We think the conclusion of the General Term that Bliss is entitled to them is correct.

The Weil mortgage was extinguished by payment before Striker applied to Robert for a loan, and Robert had notice that the mortgage had been paid by Striker. Striker delivered to him the satisfaction executed by Weil, and there is no pretence that it did not represent the actual fact that Striker had paid the mortgage. What Striker undertook to do was to re-issue the mortgage and the bond to secure another loan equal to the amount of the mortgage. Robert assented to this proposition and made the loan on the faith of the proposed security. But there was no writing and no actual assignment of the mortgage until after Bliss had taken his mortgage. All that Robert had until the assignment was made was the possession of the bond and the satisfaction of the mortgage and the verbal agreement of Striker that the mortgage should be assigned.

In this State a mortgage is a lien simply, and the general prin-

Had constructive notice of old mortgage not of release or new equity. But and not record put him on inquiry which led reasonably lead him to discover said equity.

7

ciple is well settled that on payment the lien is *ipso facto* discharged and the mortgage extinguished. There are many cases where, for purposes connected with the protection of the title or the enforcement of equities, what is in form a payment of a mortgage, will be treated as a purchase, so as to preserve rights which might be jeopardized if the transaction was treated as a payment. But we know of no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resuscitate and re-issue it as security for a new loan or transaction and especially where the rights of third parties are in question. It would make no difference in our view whether the re-issue of the mortgage was before or after new rights and interests had intervened. We do not speak of the position of a subsequent grantee or mortgagee having actual notice of the re-issue of a satisfied mortgage before he takes his mortgage or deed. It is possible that the circumstances of the re-issue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities in this state.

The Statute of Frauds does not permit mortgages on land to be created without writing. The re-issue of a dead mortgage, if effect is given to the transaction, is in substance the creation of a new mortgage. If this was permitted it would furnish an easy way to evade the statute. The law wisely requires that instruments by which land is conveyed or mortgaged should be executed with solemn forms, and that their existence should be made known through a system of registry so as to protect those subsequently dealing with the premises. Public policy requires that dealings with land should be certain, and that transactions affecting the title should be open, and that secret agreements should not be permitted by which third persons may be misled or deceived. It would be a convenient cloak for fraud if a mortgagor, having paid a mortgage, could retain it in his possession uncanceled of record and re-issue it at pleasure. A party taking from a mortgagor a re-issued mortgage has notice which should put him upon inquiry, and he takes at the peril that it has in fact been paid.

Avoiding
neges.

Ct. shd not
compel re-iss.
of a mortgage but
might refuse
to aid unless
unless he had
do. E.g.

Seems this
doubt was
unwise. Shd
be held with
doubt

how

Aylsworth had the legal title under his deed.
Only? is did his agreement to support & pledge
of the land, being in writing, create an
equitable mortgage. Clearly did & case O.K.
St. Frds. satisfied. Was no agreement to
execute anything further & this not a
good mortgage, yet held a good Equit. mortgage.
Contra to arg. of N.Y. Ct on p. 119. Our
case O.K. & that argument wrong.

The courts talking of vendor's lien on
land & Equit. title of vendee under contract
as equitable mortgage is unfortunate. Equit.
mortgage is given in accord with intent
of parties. Vendor's lien is created by
law. Title of vendee under contract
arises out of doctrine of Spec. Perf. No
intent of parties to have a mortgage.

Whole question of when mortgage can
bring Ejectment is up later. Many
states ^{perhaps} hold that after default he can-
not. If C.L. theory adopted mortgage is the
owner in pos. If lien theory adopted then
wd seem mortgage has no it to pos. but it
is a hold-over from the C.L. theory &
certainly works no hardship.

But Ct said a person having only
an Equit. mortgage cannot hold pos. as a
legal mortgage could - he wd have to go into
Equity & get an injunction vs the
Ejectment suit. But since law & Eq.
merged in N.Y. the necessity of going
into dif Ct or jurisdiction gone. & same
Ct can grant the injunction by hold-
ing dift. Equity - a defense. But does
it follow that because a legal mortgage in
after default will be protected in pos.
that an Equit mortgage will be, even by Equity.
In state like N.Y. where legal mortgage has
no legal title wd seem that Equit mortgage

... as good as an Equit Lien as legal mtg^e has a legal Lien. But how about a state where legal mtg^e passes legal title & so rt to pos. An Equitable owner, which is most Equit. mtg^e can be, is not entitled to pos. necessarily even when he has an absolute Equitable interest as say Equitable life tenant. Am. Cas. Trust, 465. An Equitable mtg^e has only an estate for security. Still even Mass. or Ill might hold that Equit mtg^e cd keep pos. ~~Chas~~ Found no authority.

Why wasn't Equit mtg^e cut off by pltf's purchase at execution sale? Law seems.

(a) Execution purchasers take subject to Equities generally. ^{Inds: Buy simply ex. debtor's title. Have construction notice. If so. Is it like}

(b) Execution purchasers if no. notice of unrecorded conveyances do not take subject to them. Some recording act ^{expressly} favor attaching Cds rtt, others ^{are} construed as including execution purchasers under B.F.P.'s.

Stinson v. Am. At. Law 8/16/11. for two kinds of Statutes.

(c) One purchasing at own sale is held by some Cts to be like ordie purchases. Others hold him not a B.F.P. & make him subject to unrecorded conveyances.

(4) Equitable mtg^es have to be recorded & so in our case pltf failed because Ct adopted rule that a purchaser at own sale is not a B.F.P. & ∴ was subject to the unrecorded equit. mtg^e.

(5) Of course if pltf. Knew of Eq. mtg^e then clearly not a B.F.P. & took subject: but that fact did not appear.

→ Query if this view right. While cred. taking additional security is not a B.F.P. properly; yet one who receives something in total or partial discharge of debt properly is a B.F.P.

they, being very aged persons, conveyed the land to Aylesworth (who was their grandson) for the nominal consideration of one dollar. Nothing was paid in fact, but contemporaneously with the execution of the deed, Aylesworth gave back a writing not under seal, by which he certified that "the said Alonzo hereby pledges the entire use of the farm, this day conveyed to him, for the support of said Isaac and Sarah, and agrees to furnish all necessary support—such as victuals, clothing, medical aid, and all other necessary comforts of life—for both the said Isaac and Sarah; and agrees and binds himself to treat them kindly and wait upon them attentively and in a careful manner, during their natural lives and during the life of the longest liver of them, and should the produce of the farm be insufficient for that purpose, then the entire fee shall be appropriated for that purpose."

Q. ce. deed?

Aylesworth had been brought up by the Howlands, and was in his minority at the date of the above conveyance and agreement. They lived together upon the farm, Aylesworth managing it and providing for the support of his grandparents until after the death of Isaac Howland, in 1846. He then became involved in debt, and on the 29th of May, 1848, being insolvent, and several suits against him proceeding to judgment, he reconveyed the premises to Sarah Howland. No other consideration for the reconveyance was shown than that to be implied from the agreement of Aylesworth to support Mrs. Howland and his inability to perform it. The plaintiff claimed that the reconveyance was in fraud of creditors, and there was evidence warranting the jury in finding that an actual fraudulent intention to keep the property from the reach of creditors was a leading motive for the reconveyance. Mrs. Howland lived upon the proceeds of the farm, a fair rent for which was shown to be some \$60 per annum, until she sold it in 1849 to a grantor of the defendant; neither Aylesworth, nor any person in his behalf paying anything, or rendering any service toward her maintenance. She died after the commencement of this suit and before the trial. The jury found a verdict for the plaintiff, and the judgment thereon was affirmed at general term in the sixth district. The defendant appealed to this court, where the case was submitted on printed arguments.

DENIO, J. The determination of this case will depend upon the character of, and the effect to be attributed to, the instrument executed by Alonzo Aylesworth to Isaac and Sarah Howland, at the same time that the latter conveyed to him the premises in controversy. From the two papers, taken together, it is apparent that it was parcel of the consideration, upon which the conveyance was executed, that Aylesworth, the grantee, should support the grantors during their joint and several lives. The paper signed by him pro-

fesses, in the first place, to pledge the entire use of the farm for that purpose; and it is added that, if its produce shall be insufficient for the object, the entire fee shall be appropriated to accomplish it. It was, probably, intended that the transaction should operate, to a certain extent, as a gift; but this was only so far as the value of the property conveyed should exceed the value of the return which was to be made for it. As respected the latter, the arrangement was a contract, which imposed a certain duty upon the grantee, to be performed for the benefit of the grantors, and which, moreover, attempted to create a lien upon the subject of the conveyance, to secure the performance of the duty undertaken by the grantee. The intention of the parties is plain; but the question to be considered is, in what legal or equitable light the arrangement is to be regarded by the court. In our opinion, the instrument signed by Aylesworth is to be considered as creating an equitable incumbrance in the nature of a mortgage.

By the law of England, as administered in the Court of Chancery, an equitable mortgage may be created by any writing from which the intention to create it may be shown; or it may be effected by a simple deposit of title deeds without writing. It will also be allowed in favor of a vendor, for unpaid purchase money, or of a purchaser who has advanced his money on the faith of a contract for a conveyance (Miller on Equitable Mortgages, pp. 1, 2, 218, and cases cited).

These
had
def.

The courts of equity in this State have adopted the general doctrines of the English Chancery upon this subject, as upon many others. The cases of a mortgage created by a writing not sufficient to convey the premises, or by a deposit of title deeds, have not been frequent with us; but the doctrine has been applied in a few instances, and I do not find any judgment or *dictum* by which it has ever been questioned. In *Jackson v. Dunlap*, 1 John. Ca. 114, a vendor of land had executed and acknowledged a conveyance to the vendee, but a part of the purchase money had not been paid, and it was then agreed that the grantor should retain the deed until the balance should be actually paid. It was equivocal upon the testimony whether the deed had been delivered so as to pass the title or not. If it had not been, the question we are considering would not arise; but Kent, Ch. J., considered the delivery complete, and that the deed was then retained by the grantor by way of security, till payment. This, he said, was the creation of an equitable lien in the grantee. The other judges seem to have been of opinion that the title did not pass. In *Jackson v. Parkhurst*, 4 Wend. 369, it was held by the court, Judge Sutherland giving the opinion, that the pledge or deposit of a deed with the grantor, by way of security, would give him a lien in the nature of a mortgage;

but the case being at law, it was held that such a title could not be set up against the legal estate. In *The matter of Howe and wife*, 1 Paige, 125, the English doctrine, that an agreement for a mortgage is in equity a specific lien on the land, was asserted and applied by Chancellor Walworth.

The cases in which a lien for the purchase money has been established, where the title had passed to the purchaser, are more numerous (*Garson v. Grear*, 1 J. C. R. 308; *Warner v. Van Alstyne*, 3 Paige, 513; *Arnold v. Patrick*, 6 Paige, 310; *Hallock v. Smith*, 3 Barb. S. C. R. 267). These cases proceed upon the same principle which the defendant seeks to establish. The difference in circumstance which exists in the present case is against the plaintiff; for Mr. and Mrs. Howland received back from Aylesworth a written instrument, in which the lien reserved was explicitly stated, while, in the cases referred to, the lien was predicated on the implied intention of the parties without a writing or even a verbal agreement for that purpose. Another example of the same doctrine is furnished where there is an executory contract for the purchase of lands, the title remaining in the vendor; and subsequently to the contract he suffers liens upon the premises to be created. It is well settled that the interest of the vendee will be protected against every one but a *bona fide* purchaser or incumbrancer who has advanced money or property without notice of the vendee's equity (*Lane v. Ludlow*, 6 Paige, 316, note; *Parks v. Jackson*, 11 Wend. 442). In such cases, the vendee is considered in equity as the owner, and the vendor as his trustee.

Assuming that it has been shown that Sarah Howland occupied the position of a mortgagee of the land to secure the agreement of Aylesworth to support her during her life, the next inquiry is, whether the plaintiff, by recovering a judgment against him and purchasing the premises on the execution, is in a better situation than he would have been were she, or her representatives, now asserting a claim against him to subject the premises to the payment of a compensation for the provision which he had failed to make. Upon this point, the cases already referred to for another purpose, and many others, are entirely decisive. It will be sufficient to mention the case *In the matter of Howe*, and that of *Arnold v. Patrick*, which are full to this purpose. In the last case, the equitable lien for the balance of the purchase money was established against a judgment creditor who had sold the land on execution, and had himself become the purchaser. The chancellor said the plaintiff in the judgment was not entitled to claim protection as a *bona fide* purchaser, even if he had no notice of the facts establishing the equitable lien; "for," he added, "he bid in the property on his own judgment for an antecedent debt, paying no new consideration."

no. It is no intent in this case

Here vendee becomes owner in equity. That is diff.

Judgment creditor not a bona fide purchaser.

Even tho he bids in at Sheriff's sale.

He, therefore, took the legal title under the sheriff's sale, subject to the equitable lien for the unpaid purchase money."

* Considering the rights of the parties to be such as have been mentioned, and the fact being that the defendant is in possession under Sarah Howland, the remaining question is, whether the plaintiff can maintain ejectment on his legal title against a party clothed with her equitable interest. It is well settled, that a mortgagee in possession, the mortgage being forfeited by non-payment, can defend himself in a possessory action brought by the mortgagor, though, if he were out of possession, he could not now maintain ejectment against the latter (*Phyfe v. Riley*, 15 Wend. 248).

But this, I think, is not so, except in the case of a technical mortgage, conveying, subject to the condition, a legal title to the premises (*Marks v. Pell*, *Jackson v. Parkhurst*, *supra*). If the present were, therefore, an action of ejectment, prosecuted under the former practice, in which nothing but legal principles could be taken into consideration, then, as the deed from Aylesworth to Mrs. Howland has been found to be fraudulent, I think the defendant could not resist the plaintiff's title. But, since the blending of legal and equitable remedies, a different rule must be applied. The defendant can defeat the action upon equitable principles; and if, upon the application of these principles, the plaintiff ought not to be put into possession of the premises, he cannot recover in the action. It has been shown that the premises were, in effect, mortgaged to Howland and his wife to secure the performance of Aylesworth's agreement to support them and the survivor of them during life, and that the plaintiff has taken the place of Aylesworth. When he obtained title by the execution of the sheriff's deed, Aylesworth had been in default in the performance of his agreement for nearly three years. Mrs. Howland and her grantees, it is true, had been in possession, and had enjoyed the use of the premises, but no account has been taken to show how far the income derived from that source would go in fulfilment of the agreement. This action is not brought for a redemption, and is not adapted to that kind of relief. It would be manifestly inequitable to let the plaintiff into possession until he shall procure an account to be taken, and shall pay or tender the amount which shall be found in arrear upon the above mentioned agreement, executed by Aylesworth, for the support of Mrs. Howland up to the time of her death.

The judgment of the Supreme Court must be reversed; and, as we cannot certainly say what case the plaintiff may make, now that the legal principles which govern the action have been determined, there must be a new trial, with costs to abide the event. If the main features of the case cannot be changed, the only remedy

by def. Howland
 Cal. def. Howland
 has legal title
 but can't bring
 ejectment by
 St. Ann's
 it is possible
 3 remedies
 vs. either 150
 weeks. cont.

.

.

.

.

.

.

.

.

.

└─┘

under V.R. when an oral Cont. written O.T. is
afterwards made enforceable by writing, that relates
back to renders contract good ab initio vs all
anyhow except B.F.Ps. Found no authority
as to them. Some cases rely on fact that 2d
party was not a B.F.P. Probably ~~did not re-
late back as to B.F.Ps. But given the it~~
~~of party under oral contract is not a mere~~
~~equity - it is an unenforceable legal it.~~
~~In our case clearly assignee in bankruptcy~~
~~is not B.F.Ps. Seems clear that not be~~
~~no good is a B.F.P. The Contract to convey~~
~~land whether by sale or an inter vivos, even~~
~~if enforceable, only an equity in the land.~~
~~That not be no good vs B.F.Ps. If it is~~
~~added that when oral it is unenforceable,~~
~~it clearly shd not be good vs B.F.Ps. ^{But inter} if?~~
In our case assignee in bankruptcy are
clearly not B.F.Ps.

for the plaintiff is to institute a suit for redemption, upon the principles which have been mentioned.¹

All the judges concurring,

Judgment reversed, and new trial ordered.

Bankrupt agreed with guardian of deft's, bankrupt's niece, to give them a mortgage. This was 15 mos before bankruptcy. 18 days before bankruptcy he gave the mtge. Suit by assignee in bankruptcy to set aside as a fraudulent preference. Held for deft. Agree.

BURDICK v. JACKSON. SUPREME COURT OF NEW YORK, GENERAL TERM, 1876.

(7 Hun, 488.)

Appeal from a judgment entered on the report of a referee dismissing the complaint.

Agreement in consideration to give mtge to one in equity. Or at least when mtge is made it relates back to time of agreement.

The action was brought by the plaintiff as assignee in bankruptcy, to set aside a mortgage given by the bankrupt to his nieces, the defendants, Ida J. Jackson and Carrie A. Jackson, on the ground that it was a fraudulent preference under the bankrupt act. The mortgage was executed eighteen days before the filing of the petition in bankruptcy, but was given in pursuance of a parol agreement between the bankrupt and the guardian of the infants more than fifteen months before.

This appeal was argued at the January term, 1875, and a reargument ordered at the October term following.

GILBERT, J. We concur fully with the referee in his conclusions of fact and of law. One of the first principles of equity is that it looks upon things agreed to be done, as actually performed. Acting upon this principle, courts of equity in England and in this country have held that an agreement based upon a valuable consideration to give a mortgage, will be treated in equity as a mortgage. That doctrine has been acted upon so frequently and for so long a period of time that it may justly be regarded as forming a part of the law of the land (Story Eq. Jur., § 553; *Russel v. Russel*, 1 Bro. C. C. 269, and notes to that case in 1 Lead. Cases Eq. 541; *Read v. Simons*, 2 Desauss. 552; *Welsh v. Usher*, 2 Hill Eq. 167; *Dow v. Ker*, 1 Spen. Eq. 414; *Bank v. Carpenter*, 7 Ohio, 21; *In re Howe*, 1 Paige, 125; *Chase v. Peck*, 21 N. Y. 581; Willard Eq., Potter's ed. 441, et seq). If, therefore, the agreement of December, 1871, had been made directly with the defendants, Ida and Carrie, there can be no question that it would have given them a specific equitable lien upon the land in controversy, which would have been prior and paramount to the title of the plaintiff and to

properly sub. just to it. If unenforceable by St. Ind. the later written mtge could that. Promise to guardian of deft's executed to deft. to same as guardian acted for them.

No doubt as to debt of nieces. See 130←

No new facts in full report.

¹ *Hall v. Hall*, 50 Conn. 104 (1882).

Written agreement to give mtge held good as a bona fide donee.

the general liens of the judgment creditors whom he represents. Having been made with their guardian while they were infants, it inured to their benefit and was well executed by the mortgage to them. Conceding that while the agreement remained executory it was within the statute of frauds, and so not enforceable for the reason that it was not in writing, yet, when the promisor actually executed the agreement by the delivery of a formal mortgage, all objection to its validity, on that ground, was removed, and the agreement became as effectual for all purposes as if it had been reduced to writing originally (*Siemon v. Schurk*, 29 N. Y. 598; *Dodge v. Wellman*, 1 Abb., Ct. App. Dec. 512; *In re Howe*, *supra*; *White v. Carpenter*, 2 Paige, 217; *Arnold v. Patrick*, 6 id. 310). Under our statute a parol agreement in respect to lands cannot be avoided in equity because it is not in writing, where there has been a part performance of it (*Freeman v. Freeman*, 43 N. Y. 34). *A fortiori*, it cannot where it has been fully executed. The plaintiff is not a *bona fide* purchaser, but stands in the shoes of the bankrupt. He cannot, therefore, assert any better right than the bankrupt himself. The execution of the mortgage gave the defendants a lien, which took effect, by relation, as against the bankrupt and purchasers from him with notice, at the time the agreement to give it was made. The plaintiff, not being a *bona fide* purchaser, took the transfer to him subject to that lien. That being so, no question of fraud or of a preference in violation of the provisions of the bankrupt act has arisen, and the evidence precludes any inference of other kinds of fraud. It is unnecessary to review the cases cited on behalf of the appellants, for none of them seem to us to conflict with the foregoing views.

Must refer to a discharge of a mortgage prior to the parol agreement.

The plaintiff is not in a position to raise the objection that the agreement to discharge the old mortgage and to receive the new one in lieu of it was invalid because the guardian violated his duty and transcended his power in making such an agreement. Such a transaction is not absolutely void, but is voidable only, at the election of the infants on coming of age. It being obviously for the benefit of the infants that the lien shall be established and upheld, we will give effect to the intendment that their ratification will be forthcoming at the proper time and to the rule that no one but themselves can disavow the authority of their guardian to make the agreement (*Co. Lit.*, 2 b; 2 Kent Com. 236; *Keane v. Boycott*, 2 H. Bl. 511; *U. S. v. Bainbridge*, 1 Mason, 82). The plaintiff has no claim to be the champion or protector of the infants and can acquire no rights by assuming that character.

Some objections to the admission of evidence were taken by the plaintiff. We think they were properly overruled.

The judgment should be affirmed, with costs, to be paid out of

one seems thoroughly sound. Some reason for rule when land not subject to execution — a wrong way of making it subject, however. But now no reason why Equity shd give this special protection to Vendor. Clearly no intent to have it + no trust. Can it be argued that is a natural equity growing out of fact that if not so held the party who takes land from vendee, for debt say, is unjustly enriched at expense of Vendor. Vendor's land which, before, the vendee's ^{creditor} ~~debtor~~ could not touch is now made available to ~~debtor~~ ^{creditor} the Vendor is out some the land + has nothing in return. Answer is that that is just the position in which the Vendor has voluntarily put himself. He has deeded land to vendee + kept no strings on it but relied on any cred has relied on Vendor's personal responsibility. If Vendor of land can claim such a right so can Vendor of a chattel or anything else so long as fund could be traced.

- Vendor's lien is founded on by Ct that Enforce it. Not always in Cal. It is not good to secure unliquidated demands. N.Y. to secure promise to assume in. Cumbances. Purely personal + can't be assigned. The power to representation on death. May be waived by taking ^{other} security. + otherwise. It is an Equity — N.Y. vs B.F.Ps. The waiver ^{from taking security} is presumptive only and may be overthrown. Thus oral ev. will over. throw it tho oral ev. wd not make a good eq. intge. Not waived by simply taking vendee's note

the estate of the bankrupt, if that is sufficient; otherwise by the plaintiff personally.

Smith, J., concurred.

Mullin, P. J., concurred solely on the ground that it was shown on the trial that the defendants were not at the time of receiving the mortgage aware of the insolvency of the mortgagor, and that the mortgage, as to them, was in fraud of the bankrupt law.

Judgment affirmed, with costs.

Fact not given.

Held: AHREND v. ODIORNE, 118 Mass. 261 (1875). GRAY, C. J. The plaintiff principally relies upon the doctrine of the English courts of chancery that the vendor of real estate by an absolute deed has a lien thereon for the unpaid purchase money, without proof of any agreement of the parties to that effect.

See margin & underlined. The earliest case which contains a full discussion of the doctrine, the source from which it is derived, and the reasons and authorities by which it is supported, is *Mackreth v. Symmons*, 15 Ves. 329, decided by Lord Eldon in 1808. If, as the learned chancellor thought, "the doctrine is probably derived from the civil law as to goods," it is somewhat remarkable that it was never applied in England except to real estate (Adams on Eq. 127). The only grounds upon which it has been rested are natural equity; a supposed intention of the parties; and a trust arising out of the unconscientiousness of the vendee's holding the land without paying the price.

As to natural lien.

It was forcibly argued by counsel in *Blackburne v. Gregson*, 1 Cox Ch. 90, 100; s. c. 1 Bro. Ch. 420, and not answered by the court, "As to the general question of the lien, it is called a natural lien; but it certainly is not so with respect to personalty, which, if once delivered, it is conclusive, though concealed from all mankind; and there seems as much natural equity in the case of personalty as realty."

As to intent to have it.

The presumption of an intention of the parties has been well disposed of by Chief Justice Gibson: "The implication that there is an intention to reserve a lien for the purchase money, in all cases in which the parties do not by express acts evince a contrary intention, is in almost every case inconsistent with the truth of the fact, and in all instances, without exception, in contradiction of the express terms of the contract, which purport to be a conveyance of everything that can pass" (*Kauffelt v. Bower*, 7 S. & R. 64, 76, 77).

As to trust.

The theory that a trust arises out of the unconscientiousness of

the purchaser would construe the non-performance of every promise, made in consideration of a conveyance of property to the promisor, into a breach of trust; and would attach the trust, not merely to the purchase money which he agreed to pay, but to the land which he never agreed to hold for the benefit of the supposed *cestui que trust*.

The earliest cases upon this subject in England were decided long since the settlement of Massachusetts; and in all those decided before our Revolution (except *Bond v. Kent*, 2 Vern. 281, in which the purchaser secured part of the purchase money by mortgage and gave a note payable on demand for the rest, and it was held that the amount of the note was not a charge upon the land; and *Gibbons v. Baddall*, 2 Eq. Cas. Ab. 682, note, which is very briefly stated, without indicating when or by whom it was decided, in a volume called by Lord Eldon a "book of no very high character;" *Duffield v. Elwes*, 1 Bligh. N. R. 497, 539), either the conveyance was retained in the custody of the vendor as security for the payment of the purchase money, as in *Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; *Fawell v. Heelis*, Ambl. 724, 726; *Coppin v. Coppin*, Sel. Cas. in Ch. 28; S. C. 2 P. Wms. 291; or the statements of the general doctrine were *obiter dicta*, as in *Harrison v. Southcole*, 2 Ves. Sen. 389, 393; *Walker v. Preswick*, ib. 622; *Burgess v. Wheate*, 1 W. Bl. 123, 150; S. C. 1 Eden, 177, 211.

Lord Eldon himself, in *Mackreth v. Symmons*, said: "It has always struck me, considering this subject, that it would have been better at once to have held that the lien should exist in no case, and the seller should suffer for the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not, exist" (15 Ves. 340). But he felt himself obliged to declare, as the result of all the authorities, that it was clear that different judges would have determined the same case differently; that if some of the cases, that had been determined, had come before himself, he should not have been satisfied that the conclusion was right; and that it was "obvious that a vendor taking a security, unless by evidence, manifest intention or declaration plain he shows his purpose, cannot know the situation in which he stands, without the judgment of a court how far that security does contain the evidence, manifest intention or declaration plain upon that point" (15 Ves. 342).

So Mr. Justice Story, in *Gilman v. Brown*, 1 Mason, 191, 221, 222, upon a review of the English cases, concluded that the right of the vendor was not "an equitable estate in the land itself, although sometimes that appellation is loosely applied to it;" but "a

right which has no existence, until it is established by the decree of a court in the particular case, and is then made subservient to all the other equities between the parties, and enforced in its own peculiar manner and upon its own peculiar principles."

The most plausible foundation of the English doctrine would seem to be that justice required that the vendor should be enabled, by some form of judicial process, to charge the land in the hands of the vendee as security for the unpaid purchase money. And the restriction of the doctrine to real estate suggests the inference that the Court of Chancery was induced to interpose by the consideration that by the law of England real estate could neither be attached on mesne process, nor, except in certain cases or to a limited extent, taken in execution for debt (2 Bl. Com. 160, 161; 4 Kent. Com. 12th ed., 428, 429).

But by an act of Parliament, passed in 1732, lands and other real estate within the English colonies were made chargeable with debts and subject to like process of execution as personal property (St. 5 Geo. II., c. 7, § 4). And in Massachusetts lands had been made subject to attachment, as well as execution, by successive statutes of the Colony and Province, reaching back almost to the time of the first settlement (Col. Sts. 1644, 1647; 2 Mass. Col. Rec. 80, 204; Mass. Col. Laws, ed. 1672, 7, 104; Prov. St. 1696, 8 W. III., c. 10; 1 Mass. Prov. Laws, State ed., 254; Anc. Chart. 49, 154, 155, 292; 5 Dane Ab. 23). There is much less reason therefore for adopting the doctrine in this Commonwealth than in England (*Womble v. Battle*, 3 Ired. Eq. 182; *Wragg v. Comptroller General*, 2 Desaus. 509).

In *Gilman v. Brown*, 1 Mason, 191, 219, Mr. Justice Story said: "Nothing can be clearer than that by the law of Massachusetts no lien in any case whatever exists upon land for the purchase money." In the argument of the same case on appeal, this was admitted on both sides (*Brown v. Gilman*, 4 Wheat. 255, 264, 273) and the Supreme Court, in the opinion delivered by Chief Justice Marshall, expressed no doubt upon that point. Mr. Dane also says that no such lien exists in Massachusetts (9 Dane Ab. 159).

It is true that in their time this court had a very limited jurisdiction in chancery. But ever since 1836 it has been vested with full equity jurisdiction over all trusts, express or implied (Rev. Sts., c. 81, § 8, & commissioners' notes; *Wright v. Dame*, 22 Pick. 55; Gen. Sts., c. 113, § 2). During this period of almost forty years, only two attempts have been made to invoke the exercise of this jurisdiction in cases at all analogous to the present. In *Wright v. Dame*, 5 Met. 485, 503, the general question of vendor's lien was argued; but as the facts of the case showed an express trust, it was not decided. But the opinion of the court in *Hunt v. Moore*, 6

2.
Pro. allowed
in Sup. Ct. case
← land not
subject to
execution.

Cush. 1, 3, strongly tends to the conclusion that the failure of a purchaser of land to pay the consideration agreed could not create an implied or resulting trust. The suggestion, at the close of that opinion, that a court of full equity powers might perhaps afford the plaintiff relief, did not relate to the trust relied on, but to an allegation of fraud, of which, as a distinct head of equity jurisdiction, this court had no cognizance until the passage of the St. of 1855, c. 194.

Authonly.

The English doctrine of vendor's lien has been adjudged not to exist in Maine (*Philbrook v. Delano*, 29 Maine, 410, 415). And it does not appear to have been ever adopted in any of the New England States, except Vermont, in which, after being affirmed by the court, it has been abolished by the Legislature (*Arlin v. Brown*, 44 N. H. 102; *Perry v. Grant*, 10 R. I. 334; *Dean v. Dean*, 6 Conn. 285; *Atwood v. Vincent*, 17 Conn. 575; *Manly v. Slason*, 21 Vt. 271; St. of Vt. of 1851, c. 47; Gen. Sts. of Vt. of 1862, c. 65, § 33).

In *Brown v. Gilman*, 4 Wheat. 255, 290, Chief Justice Marshall treated the question as governed by the consideration whether the doctrine had been adopted by the law of the particular State. And the doctrine has never been affirmed by the Supreme Court of the United States, except where established by the local law, as, for instance, in Ohio (*Bayley v. Greenleaf*, 7 Wheat. 46; *Tiernan v. Beam*, 2 Ohio, 383), in Georgia (*M'Lean v. M'Lellan*, 10 Pet. 625, 640; *Harden v. Miller*, Dudley, 120), and in the District of Columbia (*Chilton v. Brand*, 2 Black, 458); the doctrine having been previously affirmed in the States of Maryland and Virginia, out of which the district had been formed (*Moreton v. Harrison*, 1 Bland, 491; *Redford v. Gibson*, 12 Leigh, 332); although it has since been abolished in Virginia by statute (*Yancey v. Mauck*, 15 Grat. 300).

The decisions in the courts of those and many other States in favor of the doctrine, which are collected in the notes to 2 Sugden on Vendors, 8th Am. ed., c. 19, suggest no reasons and afford no grounds why we should now for the first time adopt in this Commonwealth a doctrine which has never been supposed by the profession to be in force here; which would introduce a new exception to the statute of frauds; which, as experience elsewhere has shown, tends to promote uncertainty and litigation; and which appears to us to be unfounded in principle, unsuitable to our condition and usages, and unnecessary to secure the just rights of the parties. If no third person has acquired any rights in the land by *bona fide* attachment or conveyance, the original vendor may secure payment of the debt due him for the purchase money by the usual attachment on mesne process. If any third person has acquired rights in the property, there is no reason why

St. Frh.

Hardly an exception as created by law.

Best arg. against Vendor's

case is an unfortunate one.

(1) If argued that equitable mtge seems hard to find any agreement in writing to make one, or any writing showing an understanding that property shd be good for Aml. Was simply a resolution to make a mtge to others to raise money to pay pft.

(2) Is an anomalous retention of vendor's lien if looked at as that. Just as much principle for it as for Vendor's lien but that wrong & this an retention.

Bright v. Boyd is note at end of case. ^{interesting.}
~~Contracting diff.~~ That a question in quasi-
Contracts. Will one who bona fide
makes improvements on property he
thinks his own but which is not
have (1) a right to recover for them
(2) a lien for them on the property?
Shd clearly have a rt to recover. (card) But
ques if shd have lien, that was given w.o.
any consid. Seems error. Given in
~~some~~ ^{one} of the other cases like Bright v.
Boyd, however. But no case where
intervening crds involved — still if Equit.
lien wd seem to be good as to all,
but B. F. Ps. ~~To~~ To give a lien is ano-
ther extension of Vendor's lien idea — i.e. Equity-
protecting one who did not ~~see fit~~ ~~to~~ protect
himself. Greatest trouble is that is not capable
of record or of being easily discovered & subsequent
Equitable mtges, crds., etc may get into
bother & expense by it. Also it gives one cred a
preference over others, but that not so bad as
his money made this value available to creditor
Also in a case like Bright & Boyd there is more
reason for lien since cred (improvr & vltly) doesn't
know of mistake & so of necessity of taking mtge
& couldn't get one any how.

equity, any more than the common law, should interpose to defeat them.

It may be doubted whether, upon the case stated in the bill, the plaintiff would be held entitled to the lien which he asserts in those courts which recognize the existence of a vendor's lien for unpaid purchase money (1 Perry on Trusts, § 235). But as we are clearly of opinion that no such lien exists in this Commonwealth in any case without agreement in writing, we do not propose to entangle ourselves in the refinements and embarrassments which are inseparable from its judicial consideration and affirmance.

Property was bought for a bishop's residence by plaintiff as chairman of a committee & transferred to trustees of the Episcopal Church & by them to plaintiff as trustee. Plaintiff, by order of proper persons spent money in improving property.

PERRY v. BOARD OF MISSIONS. *proving property & vote of congregation of church ordered property to pay for bal of purchase price & repairs. A*
COURT OF APPEALS OF NEW YORK, 1886. *note of*
(102 N. Y. 99.) *utge for*

One who makes improvements on realty with an understanding that he is to have a mortgage for the amount is entitled to a lien in the nature of a mortgage upon the premises.
Appeal from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made February 4, 1884, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.
This action was brought to have a lien declared in the nature of a mortgage upon certain premises, the title to which is in the defendant, for moneys advanced by plaintiff to pay for repairs and improvements upon said premises.
The material facts are stated in the opinion.
E. Countryman for appellant.
Hamilton Harris for respondent.
DANFORTH, J. Upon trial before a referee the plaintiff has been declared entitled to a lien in the nature of a mortgage upon certain premises on Elk Street, in the city of Albany, for a balance due him for advances made for improvements and repairs thereon and for interest on an existing mortgage, amounting to the sum of \$4677.38, besides costs, and in case the same is not paid within a certain time, that said real estate be sold in the same manner as sales are made upon mortgage foreclosure, and, of the proceeds of such sale, the plaintiff be paid the amount of said lien, with interest as aforesaid, together with his costs and disbursements. Upon appeal to the General Term the judgment upon this report was affirmed.

Some objections were made by the defendant to the admission of certain testimony, but it is not now contended that the facts found by the referee are not warranted by the evidence, or that

utge for 8500 pd bal of price & part of pliff's bill. Held pliff has an Equitable utge for bal of his bill. Vote should be agreement for a utge. Also like Vendor's lien.

they were not within the issues raised by the pleadings. The contention is against the referee's conclusion of law. It appears by his report that in September, 1869, the Right Reverend William Croswell Doane was bishop of Albany, and at that time by the action of the convention of the Protestant Episcopal Church in that diocese a committee was appointed to take such steps as they might deem expedient for procuring a residence for the bishop; that in February, 1870, the vestry of St. Peter's church, in that city, appointed a committee, of which the plaintiff was chairman, to solicit subscriptions for the above purpose, and in that character he received moneys from various persons, in all to the amount of \$12,825, and in June, 1870, under the advice of the bishop, and with the consent of the diocesan committee, he bought the premises above referred to at the price of \$18,000 (of which \$5000 was in a then existing mortgage). He paid the residue, and upon like consent caused the property to be conveyed, subject to the mortgage, to a corporation called "The Trustees of the Episcopal Fund of the Diocese of Albany;" that thereupon "plaintiff, at the request of the bishop, commenced making various improvements, alterations and repairs in the dwelling upon the premises so purchased, all of which were necessary and proper to make it a suitable and convenient residence for him, and the plaintiff advanced the moneys required to pay the bills for such improvements and repairs; that at the annual meeting of the diocesan convention, in September, 1870, the diocesan committee made a report which stated the manner in which the title was taken, described the property and referred to the repairs and improvements. This report was, on motion, accepted." And at the same time the convention, with the consent of the trustees of the Episcopal fund, directed them to transfer the title to said property to the defendant herein, "to be held and used for the support of the Episcopate, and be a place of residence for the bishop of the diocese, and that the said board of missions be authorized and directed to make a bond and mortgage on the premises to secure the payment of the incumbrance thereon, of \$5000, and also the payment of the sum advanced for the repairs and fitting up of the same for the Episcopal residence," intending thereby to provide for and cover all the expenditures incurred by plaintiff for the improvements and repairs then in progress, and contemplated and included, as well the sums thereafter advanced as those which had then been actually paid.

The defendant is a corporation having power, among other things, to take and hold property used or intended to be used for "diocesan institutions or purposes in the said diocese," and is subject to the directions and instructions which shall be given to it by the said convention (Laws of 1870, c. 13).

At this time the repairs and improvements were in progress, and only the sum of \$173.92 had then been advanced by plaintiff in payment therefor. On the 20th of October, 1870, in accordance with the above directions, the trustees of the Episcopal fund of the diocese of Albany conveyed the premises to defendant in trust as a residence for the bishop of Albany, and on the same day, at a regular meeting of the board, the following resolution was passed:

"Resolved, That this board do, in accordance with the direction of the convention, hereby accept the conveyance of the said premises, to be held in trust for the uses and purposes above mentioned, and further that the president of this board, the Rt. Rev. William Croswell Doane, S.T.D., Bishop of Albany, be and is hereby authorized in its name and behalf to execute and affix the corporate seal of this board to a bond and mortgage upon the said premises for a loan not to exceed \$8500, with interest, the proceeds of which shall be applied to the payment of the said existing mortgage of \$5000 thereon, and the said expenses of the said repairs and improvements," and in pursuance of said resolution on December 30, 1870, defendant, by its president aforesaid, executed and delivered to one Earl L. Stimson a bond with a mortgage upon the premises aforesaid for the sum of \$8500, which sum was loaned and advanced to it by said Stimson, and was by it paid over to plaintiff, who paid out of the same the mortgage of \$5000, and the interest thereon, then unpaid, amounting in all to the sum of \$5220.47, and the same was cancelled of record, and the balance of said sum was credited and applied by plaintiff in his account for the advances made by him as aforesaid toward the purchase price of said premises, the expenses incident to the same, and for said improvements and repairs.

Other facts are found which require no special mention, but which show that the amount for which a lien was declared was justly due for advances made under the circumstances above stated.

It is objected by the appellant that the plaintiff is not, by reason of any of these facts, entitled to an equitable lien upon the premises for the benefit of which they were made. We are of a different opinion.

The principle upon which a court holds that a vendor who has not been paid is entitled to a lien on the land sold is that it would be contrary to natural justice to allow a purchaser to retain an estate which he has not paid for, and it seems very clear that there is a like natural equity in favor of the plaintiff. It is true he did not sell the estate, but he added to it, and by his expenditures upon it fitted it for the purpose for which it was intended. [A lien for

*Red entered
property for
\$500 & with
the plat for
prior \$500
inter + affix
val of \$500 to
his c/c. of
parently sent
is for but still
the prop.*

*Like vendor's
lien.*

the price of an estate sold exists without any special agreement and by virtue of a doctrine merely of a court of equity. Here there is a special agreement and also a case to which the doctrine applies:

No agreement for charge.
No.

has simply giving an apt or subordinate authority to make a charge

First. The special agreement. It may be found in the resolution of the convention of 1870, by which the defendant was required in substance to provide by bond and mortgage "for the payment of the sum advanced for the repairs and fitting up of the Episcopal residence"—the one in question. The learned counsel for the appellant seeks to limit this expression by the rules of grammar, and confine the security to the sum then or already advanced, to the exclusion of all advances subsequent thereto. We do not think, however, that the framers of the resolution selected the word for the purpose of marking either present or future time, but to denote a fact which might include various transactions requiring the expenditure of money by some person other than themselves, the whole, by whomsoever or whenever made, constituting "the sum advanced," in rendering the place fit and suitable as a residence for the bishop of the diocese. The resolution in question was in writing; it was entered in the journal of the convention, and the defendant was bound to conform to it (C. 13, Laws of 1870, *supra*).

Like Vendor's Lien.

Seems hard to argue that was an implied cont.

Second. The plaintiff's case is within the general doctrine of equity, which gives a right equivalent to a lien, when in no other way the rights of parties can be secured. The advances were directly for the benefit of the real estate; they were approved by the convention by whose directions the title was conveyed to the defendant, but neither the convention nor the defendant have incurred any corporate liability, and while it may be said that the advances were made on the promise of, or in the just and natural expectation that, a mortgage would be given, it is also true that they were made on the credit of the property, for the improvement of which they were expended. The repairs and improvements were permanently beneficial to it, made in good faith, with the knowledge and approbation of the parties interested, and accepted by them, not as a gratuity, but as services for which compensation should be given. The plaintiff's right to remuneration is clear, and unless the remedy sought for in this action is given, there will be a total failure of justice.

So that this statement is questionable.

It would seem to follow that no error was committed by the referee in directing a sale of the property, and the application of the proceeds to the payment of the plaintiff's claim. But the learned counsel for the appellant argues that as the defendant's relation to the property is that of trustee, such enforcement of the lien would destroy the trust, and so defeat the very object of the

known merely doctrine of title by estoppel.

(1) That applies to realty & probably also to personalty. Not much authority as to latter.
~~no reason for distinguishing.~~

(2) To have title by estoppel probably must have a conveyance either (1) reciting title so as to have estoppel by deed, or

(2) Containing covenants of warranty, further assurance, title, or release so as to create circuity of action. If grantor (here wife) shd sue grantee for land grantee wd have action back for its value on breach of warranty covenant. True damage for breach of covenant under law wd not always be equal to value of land but that not considered.

In Rippon, Estoppel, 2nd, Ch. II is a full historical dis of this question.

(3) Does title pass as soon as grantor gets it or is it a mere equity estoppel? If former good is B. & P. If latter an equity & not good is B. & P.

If former becomes a legal intgee in our case as soon as intgee gets title: if latter is. Come an equity intgee at that time. Better view is that only an

estoppel. That estoppel is not a conveyance of land because not owned at time & no conveyance later. Estoppel does not convey but prevents

non-conveyance being shown. Circuity of action doesn't convey title. Further.

Contrary to spirit of recording laws to have a man bound by a conveyance outside the chain of title - given before grantor got title. Our

But Tiffany & Rand are cited to Rippon on this. I hold that is good equity - that as wife he is precluded from conveying land must be made do it in equity.

isn't 'pass' - is merely ~~estoppel~~ to have a conveyance in equity.

conveyance through which they derive title. The trust was for the habitation and use of the bishop of the diocese; it was accepted with notice that the improvements were necessary to fit the buildings for occupation, and had been begun under proper authority. It was the duty of the defendant to allow them to be finished, and it will be no violation of the conditions upon which the premises are held, to subject them to a charge for the cost of the repairs through which alone the purposes of the trust were accomplished. If the building should now be burned, it might with the same force be urged that the mechanic who might repair or reconstruct it could acquire no lien, because enforcing it might diminish or even absorb the property. A statutory lien would be no better than the plaintiff's lien in equity.

The usual course of enforcing an equitable lien is by a sale of the property to which it is attached, and we find nothing in this case to take it out of the general rule. The appellant's remaining point is a sweeping one relating to various items of evidence of the bishop's declarations, letters and acts in connection with the purchase and repairs of the house. Under the circumstances disclosed in the record, they were properly received, either as acts of agency, or part of the transaction.

We think the decision of the referee was warranted by the facts before him, and that the judgment appealed from should be affirmed.¹

All concur.

Judgment affirmed.

omit
4. Perkins had title. He let his son M.B. Perkins into pos. Son forged & recorded a deed to him self. He then gave debt a note for 10000. Later M.B. recorded a deed from himself back to father. Then Y. Perkins really conveyed

TEFFT v. MUNSON.

COURT OF APPEALS OF NEW YORK, 1872

(57 N. Y. 97.)

Notice of wife to debtors held
This was an action to restrain defendants, loan commissioners Estopped bind all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
for Washington County, from foreclosing a mortgage executed to all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
no title, sub-them by Martin B. Perkins and wife.
On the 18th day of January, 1848, Gamaliel Perkins purchased all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
of Cortland Howland certain lands in Washington County, which all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
were conveyed to him by warranty deed recorded March 7, 1848, all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
3d party.
Compare Bright v. Boyd, 1 Story, 478 (1841), in which improvements all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
made by a bona fide purchaser of land whose title proved defective were all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
allowed as "a lien and charge on the estate."—Per Story, J., 2 Story, 608. all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
in estate as all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
bound by this estoppel all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
not carried the subsequently all in equity by estate blind, as has & leaves pt of is Estopped to deny that title passed from M.B. to debt under their note. It was a deed with warranty.
acquired title to the mortgage.

in the clerk's office in said county. Gamaliel Perkins, immediately after his purchase, let his son, Martin B. Perkins, into possession of the premises, who forged a deed of the land from his father to himself and placed it upon record in the clerk's office of said county, May 27, 1850. On the 1st day of October, 1850, Martin B. and his wife executed a mortgage upon said land to the loan commissioners of said county, to secure the sum of \$1000 loaned to him. This mortgage contained covenants that Martin B. and his wife were lawfully seised of a good, sure, perfect, absolute and indefeasible estate of inheritance in the premises, and that they were free and clear of and from all former and other gifts, grants, bargains, sales, liens, etc., and this mortgage was, on the day of its date, duly recorded in the book kept by the loan commissioners, as required by law. On the 23d of January, 1860, a deed of said lands, bearing date April 1, 1853, was recorded in the county clerk's office, which purported to be executed by Martin B. and wife to his father. On the 16th day of December, 1859, Gamaliel Perkins conveyed said land to Martin B., by deed recorded January 14, 1860. Until this conveyance from his father Martin B. had no title to the land, although he remained in possession of the same from 1848. On the 31st of January, 1867, Martin B., being still in possession of the lands, conveyed them to the plaintiff, who paid full value for the same without any actual notice of the mortgage to the loan commissioners. The deed to the plaintiff was recorded February 9, 1867.

The court below decided that plaintiff was not entitled to the relief sought, and directed a dismissal of the complaint. Judgment was perfected accordingly.

EARL, C. The plaintiff claims that the mortgage to the loan commissioners has no validity as against him, and that his deed has priority over it under the laws in reference to the registry of deeds and mortgages. It is a principle of law, not now open to doubt, that ordinarily, if one who has no title to lands, nevertheless makes a deed of conveyance, with warranty, and afterward himself purchases and receives the title, the same will vest immediately in his grantee who holds his deed with warranty as against such grantor by estoppel. In such case the estoppel is held to bind the land, and to create an estate and interest in it. The grantor in such case, being at the same time the warrantor of the title which he has assumed the right to convey, will not, in a court of justice, be heard to set up a title in himself against his own prior grant; he will not be heard to say that he had not the title at the date of the conveyance, or that it did not pass to his grantee in virtue of his deed (*Work v. Welland*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 id. 533; *Somes v. Skinner*, 3 Pick. 52; *The Bank of Utica v. Mer-*

Case holds that title passes. Call it so-
topped good vs every body ^{in priority} but that is
same as title passing. Seems
wrong but no doubt Wright of au-
thority.

But ^{did} false record gave notice to pld? If they had looked up record they wd have found deed from 7 to 8; then ~~8 to 7~~ 8 to 7; then 5 to 7; then 7 to 8 again. So question is have they constructive notice of false deeds from 7 to 8 or 8 to 7. If they have then notice is in chain of title & have constructive notice of it clearly. Friend says knows no au-
thority as to constructive notice of false instruments on record but thinks clearly is no Const. notice. That seems right. Not really en-
titled to record. See card. Law settled that no Constr. notice.

sereau, 3 Barb. Ch. 528, 567; *Jackson v. Bull*, 1 John Cas. 81, 90; *White v. Patten*, 24 Pick. 324; *Pike v. Galvin*, 29 Maine, 183). And the doctrine, as will be seen by these authorities, is equally well settled that the estoppel binds not only the parties, but all privies in estate, privies in blood and privies in law, and in such case the title is treated as having been previously vested in the grantor, and as having passed immediately upon the execution of his deed, by way of estoppel. In this case Martin B. Perkins conveyed the lands to the loan commissioners, by mortgage with warranty of title, and thereby became estopped from disputing that, at the date of the mortgage, he had the title and conveyed it, and this estoppel applied equally to the plaintiff to whom he made a subsequent conveyance, by deed, after he obtained the title from his father, and who thus claimed to be his privy in estate. The plaintiff was estopped from denying that his grantor, Martin B. Perkins, had the title to the land at the date of the mortgage, and he must, therefore, for every purpose as against the plaintiff, be treated as having the title to the land at that date.

I, therefore, can see no difficulty in this case, growing out of the law as to the registry of conveyances. Martin B. Perkins, having title, made the mortgage which was duly recorded. He then conveyed to his father and the deed was recorded. His father then conveyed to him and the deed was recorded. He then conveyed to the plaintiff and his deed was recorded. Thus the title and record of the mortgage were prior to the title and record of the deed to plaintiff, and the priority claimed by plaintiff cannot be allowed. Assuming it to be the rule that the record of a conveyance made by one having no title, is, ordinarily a nullity, and constructive notice to no one, the plaintiff cannot avail himself of this rule, as he is estopped from denying that the mortgagor had the title at the date of the mortgage. The case of *White v. Patten*, *supra*, is entirely analogous to this. In that case the plaintiff derived his title from a mortgage, made to him by one Thayer, containing covenants of seisin, warranty, etc., and recorded February 19, 1834. At the time of the execution of this mortgage the title was not in Thayer, but in one Perry, his father-in-law. Perry afterward, by deed recorded August 2, 1834, conveyed the land in fee simple to Thayer, who conveyed the land by mortgage to the defendant, recorded the same day. The counsel for the defendant used the same arguments in a great measure which have been urged upon our attention by the counsel for the plaintiff in this case, both as to the title and the registry of the mortgages, and yet the court held in a very able opinion that the plaintiff had the prior and better title.

goes on self
not on record
bring notice.

I am, therefore, of opinion that the judgment should be affirmed, with costs.

For affirmance, Earl, Gray and Johnson, CC.

For reversal, Lott, Ch. C., and Reynolds, C.¹

Judgment affirmed.

omit.

VANDIVEER v. STICKNEY.
SUPREME COURT OF ALABAMA, 1883.
(75 Ala. 225.)

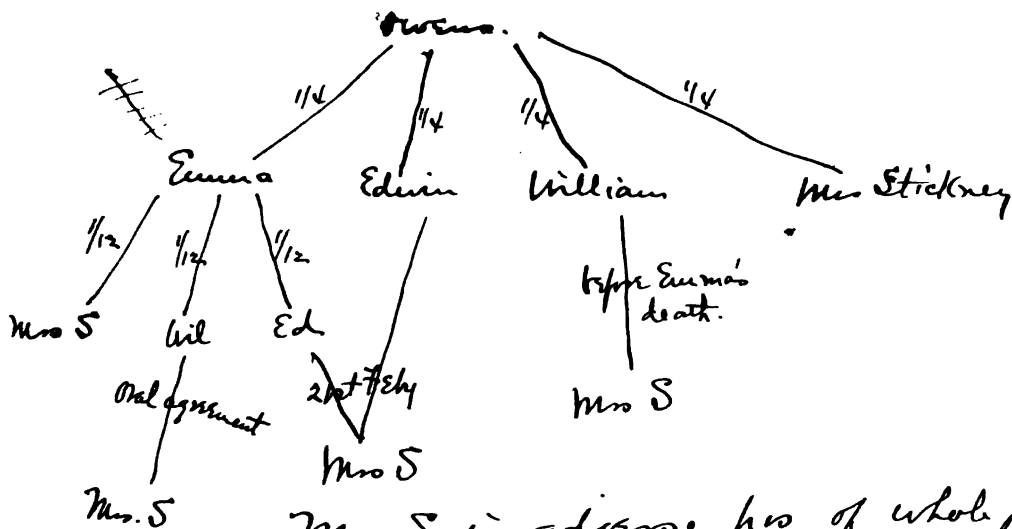
Appeal from Montgomery Circuit Court.

Tried before Hon. James E. Cobb. This was a statutory real action in the nature of ejectment brought by William P. Vandiveer against Henry G. Stickney and Mary E. Stickney; was commenced on 17th May, 1880; and, as to that portion of the land actually in controversy, to which a disclaimer filed by the defendants did not apply, the cause was tried on issues joined on the pleas of not guilty and the statute of limitations of ten years, the trial resulting in a verdict and judgment for the defendants. *mortgage of land in substance from 7 and is not as vs. such as these issues and result every one.*

The evidence introduced on behalf of the plaintiff tended to show that "the property sued for was the property of R. B. Owens at his death; that the said Owens died intestate, in the year 1862, leaving as his only heirs-at-law his children, William, Edwin, and Emma Owens, and Mrs. Stickney, the defendant; that said Emma died in March, 1869, unmarried, and without children;" that on 16th June, 1870, said Edwin and William Owens executed to the plaintiff a mortgage on an undivided two-thirds interest in the land described in the complaint, to secure money then loaned to them by the plaintiff; and that said debt had not been fully paid.

The evidence introduced on behalf of Mrs. Stickney tended to show that her sister Emma, at the time of her death, was about sixteen years of age; that prior to her death she expressed a desire that Mrs. Stickney should have her interest in her father's estate, on account of her care of her and on account of the money she had spent for her; that within a few days after the death of the said Emma, Edwin and William Owens and Mrs. Stickney "met and discussed the matter between them, and it was agreed between them that Mrs. Stickney should have said Emma's interest in said property;" that this agreement was verbal; that from the time of

¹ The dissenting opinion of Reynolds, C., is omitted.



Mrs. S. in adverse pos of whole property at time mtge by Ed & Will to plffs ~~made~~ which was ^{made} after all conveyances above. At time of mtge, however, Ed & Will were in pos of a part of property as tenants of Mrs. S. Held for deft. T. of Conn. Ct affirmed. ~~only 3 is as to Will's 1/12 gotten from Emma.~~ Deft had adverse pos of whole property for more than 10 years preceding action & so have title. True, grant by parcel of Will's 1/12 was not good deed & so Mrs. S. technically tenant at will, but tho' presumption is that tenant holds under landlord yet may hold adversely if clear ev. of disclaimer & that plain. Besides when mtge was given prop. was in pos of Mrs. S. & adverse to Ed & Will the mtgors. That Ed & Will were in pos. of part as tenants of Mrs. S. is immaterial as pos of tenant is that of landlord & so plffs had constructive notice that their mtgors were not in pos.

Granting the rule that ~~title of property~~ the title to land in adverse pos. of avo-
~~or~~ ~~as to~~ ~~to~~ ~~to~~ ~~the~~ ~~case~~

follows. Of course can go on gnd that
deft had adverse pos for 10 yrs 150 title.
But can also go as it said on gnd
that since rtg given while mtgor
not in pos of land in adverse pos
it was U.G. as a rtg. as is there
claiming adversely - here the deft.
The rule is conveying prop. in ad-
verse pos. of another cd only be relied
on by the one in adverse pos. do
vs. the mtgor the rtg had a good
rtg. But here it is the person
in adverse pos. who is relying on
the rule.

Other pts in case as to estoppel of
tenant set O.K. See margin.

said agreement, Mrs. Stickney entered into the possession of said property" by herself, or her husband, as trustee, or tenants, claiming the entire property as her own in good faith, continuously, openly, notoriously and adversely;" that she has continued "in such possession of the same by herself, husband or tenants, and was in such adverse possession at the time of the execution of said mortgage to the plaintiff, she, at that time, and ever afterward, claiming the said property as her own, in good faith, openly, notoriously and adversely to her brothers and all the world;" that on 21st February, 1870, the said Edwin executed a deed, conveying to Mrs. Stickney his undivided interest in said property, which deed was duly recorded; that the said William "had conveyed to Mrs. Stickney his undivided one-fourth interest in his father's estate, of which he was possessed, before his sister Emma's death, and that the deed conveying said interest was duly executed, prior to the death of his sister, Emma, and upon a valuable consideration; that the only right to said William's one-twelfth interest in said real estate, acquired through his said sister, Emma, claimed by Mrs. Stickney, was under and through said verbal agreement, and the adverse possession thereof as aforesaid;" and that after said verbal agreement, neither the said William nor the said Edwin ever asserted any right, title, claim or interest in or to the share of the said Emma in said property.

Plaintiff then introduced evidence tending to show that Edwin and William Owens were in possession of said stables and stable lot (a part of the property in controversy) in the spring of 1870, and at the time of the execution of said mortgage; and there was also evidence introduced by defendants, tending to show that the said William and Edwin Owens, while in possession as aforesaid, at the time of the execution of said mortgage, were there as the tenants and employees of the defendants, Stickney and wife, and in no other capacity. The said plaintiff also testified that he had no knowledge of the claim or title of Mrs. Stickney to the interest of her said brother William in said Emma's one-fourth of said property described in said mortgage.

The foregoing was the substance of the evidence introduced on the trial bearing on the questions decided by the court. The plaintiff reserved numerous exceptions to charges given and refused, which the opinion does not render necessary to set out.

Those charges are here assigned as error.

SOMERVILLE, J. We discover no error in the rulings of the Circuit Court, as shown in the present record.

In *Collins v. Johnson*, 57 Ala. 304, it was decided that an uninterrupted, continuous possession of lands by a donee, under a mere parol gift, accompanied with a claim of right, is an adverse

holding as against the donor, and will be protected by the statute of limitations, thus maturing into a good title by the lapse of ten years. The fact is immaterial that such a parol gift of lands conveys no title, and only operates as a mere tenancy at will, capable of revocation or disaffirmance by the donor at any time before the bar of the statute is complete. It is evidence of the beginning of an adverse possession by the donee, which can be repelled only by showing a subsequent recognition of the superiority of the title of the donor. The essence of adverse possession is the *quo animo* or intention with which the possession is taken and held by a defendant. It is in the settled language of the books, the intention which "guides the entry, and fixes its character" (Angell on Lim., § 386; *Ewing v. Burnet*, 11 Peters [U. S.] 41). Even where the technical relation of landlord and tenant exists, and despite the settled rule that a tenant will not be permitted to dispute the title of his landlord, there is no principle of law or of public policy which forbids a tenant from holding adversely to the landlord, so as to acquire title of the demised premises under the operation of the statute of limitations. But in all such cases, the presumption in the first instance is, that the tenant's possession is permissive and in subordination to the title of the landlord, and there must be clear and positive proof of a disclaimer or renunciation of the superior title, brought home to the knowledge of the landlord with unquestionable certainty (Angell on Lim., § 444; 2 Brick. Dig., p. 200, §§ 101, 102).

Tenant may hold adversely to landlord.

Defts have title by adv. pos. that settled case.

The evidence tended to show that the defendants held adverse possession of the lands in suit for more than ten years prior to the commencement of the action. The undivided interest of Emma Owen, which on her death descended in part to her two brothers, William and Edwin, was released by parol to their other sister, Mrs. Stickney, who is one of the defendants. Her adverse possession commenced at this time, which was about the middle of March, 1869, and is shown to have continued, without any subsequent recognition of the title of her donors, until the commencement of this suit, in May, 1880. The mortgage executed by the two brothers to Vandiveer, the plaintiff, in June, 1870, did not change the adverse nature of Mrs. Stickney's possession. nor operate in any manner to stop the running of the statute.

But also mortgagors had no adv. pos. & no adv. pos. adverse to them.

This mortgage, moreover, is shown to have been executed by the mortgagors during the period of Mrs. Stickney's occupancy and adverse holding, the hostile character of which was not only known to them, but, in its inception, was expressly authorized by their parol release of the deceased sister's interest in the mortgaged lands. The mortgage was therefore void as tending to promote champerty and maintenance by traffic in litigated titles. The

rule of law rendering conveyances of lands void, when held adversely, is, in part, one of public policy, designed to "throw obstacles in the way of asserting doubtful rights to the prejudice of occupants (*Clay v. Wyatt*, 6 J. J. Marsh, 583; *Bernstein v. Humes*, 60 Ala. 582). "It seems," says Chancellor Kent, "to be the general sense and usage of mankind, that the transfer of real property should not be valid, unless the grantor hath the capacity as well as the intention to deliver possession" (4 Kent. 448).

To avoid a conveyance on this ground, it is not requisite that such adverse possession should be asserted under any color of title, but only under claim of right. But it must be actual as distinguished from constructive possession (*Bernstein v. Humes*, 71 Ala. 260; *Eureka Co. v. Edwards*, *ib.* 248). Nor is it required that the mortgagee, or other purchaser should have actual notice of such adverse holding, in order to vitiate the conveyance. The constructive notice implied from possession is sufficient (*Bernstein v. Humes*, *supra*). Nor, yet again, does a knowledge by one in actual possession, claiming title, that his title is defective, avail to destroy its adverse character. The test is the actual claim, and not the *bona fides* of it, in all cases, at least, where the possession is actual and not merely constructive (*Smith v. Roberts*, 62 Ala. 83; *Alexander v. Wheeler*, 69 Ala. 332; *Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232). These principles are all pertinent to the present case, and were recognized in the rulings of the court.

The doctrine settled in this State is, that the possession of the tenant is the possession of the landlord, and notice of the former is notice of the latter. The reason is, as observed in a former decision, that an inquiry of the occupant will be likely to lead to a knowledge of the fact that he is a mere tenant, holding, not in his own right, but in the right of another who is his landlord (*Brunson v. Brooks*, 68 Ala. 248; *Pique v. Arendale*, 71 Ala. 91; *Wade on Notice*, §§ 284-286; *Burt v. Cassety*, 12 Ala. 734).

It was immaterial, therefore, that the mortgagors were in the temporary occupancy of a portion of the property sued for at the time of the execution of the mortgage, in the year 1870, provided they entered after the commencement of Mrs. Stickney's adverse possession, and as mere tenants, fully recognizing the superiority of her title as owner and landlord. Purchasers from tenants are as fully precluded as the tenants themselves from disputing the title of their landlord (*Taylor's Land & Ten.*, § 91; *Bishop v. Lalouette*, 67 Ala. 197). The principle settled in *McCarthy v. Nicrosi*, 72 Ala. 332, does not conflict with this view. There the possession of the vendor and purchaser was joint, both being in actual possession at the time the deed was executed. It was held that, inasmuch as there was no visible change of possession, a third person

True. But hardly. Pos. of tenant is const. notice of his landlord.

purchasing would not be charged with constructive notice of the unrecorded deed of the first vendee. If, however, the vendor had openly and visibly yielded exclusive possession to the vendee, and had afterwards gone in as a mere tenant, the rule would have been otherwise. Such is this case, in fact as well as in principle and legal effect.

Judgment affirmed.

NEW YORK REAL PROP. LAW, § 225. *Effect of Grant or Mortgage of Real Property Adversely Possessed.*—A grant of real property is absolutely void if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor; but such possession does not prevent the mortgaging of such property, and such mortgage, if duly recorded, binds the property from the time the possession thereof is recovered by the mortgagor or his representatives, and has preference over any judgment or other instrument, subsequent to the recording thereof; and if there are two or more such mortgages, they severally have preference according to the time of recording thereof, respectively.

quit.
Null by assent of poss owner of prop in adverse pos of another is valid third prop from time outgo regains pos & is superior to all other liens obtained after its record.

er and not change the usual rule as to
effect on conveyances of land in adv. pos.
another. So far as utges concerned. In
dependent of it are good except as vs.
party in adverse pos. It did make
rule more strict as to conveyances
not utges. But that no? in law of
utges.

In Cal. is provision that land in adverse
pos may be utged. In Dak. same pro-
vision as N.Y. Atkinson, Am. St. Law. I §18.

if a mortgage, proceeds wd go to personal representation of mortgage as main thing is the debt & that goes to personal representative being personally & the mortgage follows the debt. The legal title to land mortgaged wd descend to heir but he wd be trustee for personal representative. Pers. rep. is proper party to foreclose & on payment money goes to him. That being so at C.L., is still clearer under N.Y. view. Their mortgage is only a lien which is considered personal property & so descends to representative. i.e. under in org. sale.

But suppose a cond. sale the law wd be the same in Eng. & proceeds wd go to personal representative of vendor. The doctrine of equit. conversion does this acc. to Eng. cases. Is really no conversion until option is exercised they say but that then it relates back & make a conversion from time option given at least as betw. heir & representative of vendor & thus the land being converted into personally the proceeds go to representative not heir. ^{little} Ohio case contra as to relation back & ~~man~~ other authority. Seems better view is that no equit. conversion until option exercised & relation back theory a fiction. No equit. conv. until election because no equit. title in vendor until then. Entitled to get land if he elects - cannot prevent his getting land - but still no equit. title in heir. Loss wd not fall on him if property destroyed before he elected. At time of decease of vendor he has, then, the full equit. & legal title, this passes to his heir. Where ~~transf.~~ ^{transf.} is complete - not option - vendor has legal title about as mortgage has it, merely as security for price. On his death debt for price goes to representative & heir holds legal title in trust for rep. representative. ~~or else it goes to representative directly as to view of transaction~~ Trust arises because equity makes the incident follow the debt.

That taking our case as law, as to what money shd go, or shd be law. It had to decide whether cond. sale or mtge. That depends on which the parties really intended - not on what they said they intended - not on what they agreed it shd be - but on whether they really thought it has a way of securing payment or not. Court refused to give effect to what parties agreed because lender is taking advantage of borrower's necessity & extending the advantage. Like Ct refs.

nomine poenae distress
proviso for added punishment in case of default - can have distress to enforce it if specially granted as here.

Use money
will go to
Exec.

CHAPTER II. SECURITY.

SECTION I. MORTGAGE AND CONDITIONAL SALE.
Print.
ST. JOHN V. WAREHAM.
COURT OF CHANCERY, 1635.
(3 Swanst. 631.)

for 3000 £
Conveyance of land at leasehold
for 7 years at 230 £ per annum.
with proviso that lessee may
buy at end of 7 yrs at 3000 £.
Evidently lessee has bought
it is whether he is or sec. of
Acceptor shall have 3000 £.
Held for les. If grant only real purchase
option to repurchase the
price pd on resale goes
to him of vendor & not
to execs. Dictum that
after time for repurchase
up no remedy
in Eq. Dictum
that if price
to be pd is
much less
than value of
prop. that is
eq of a mtge.

THE defendants, for 3000£, conveyed the lands to Sir Richard Grobham and his heirs; Sir Richard made a lease to Wareham, rendering to him and his heirs 230£. per annum, and this lease was for seven years, with a nomine poenae distress and clause of re-entry, and a proviso, that if Wareham and his heirs should within seven years be desirous to repurchase, and signify the same to Sir Richard Grobham, his heirs and assigns, and pay them 3000£., then he and they to assure to Wareham. Lord Coventry, Richardson, Chief Justice, and Crook, decreed the money to the heir of Sir Richard G., and not to the plaintiff, Saint John, who was his executor, and justly; for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this court, 16 Car. 2., Cage v. Sir Ralph Bovy; and again, T. 24 Car. 2., in Isaac Cottingham v. Lord Cornbury, where the covenant was to re-convey, upon the repayment of the purchase money within seven years. But if the purchase money had not been near the value of the land, that and such like circumstances might have made it a mortgage.—Per Lord Nottingham, L. Ch., in Thornborough v. Baker, 3 Swanst. 628.

ing to give effect to agreement that shall be no eq. of redemption.
Up later. Holding it a mtge is done by Ct of eq. only, & not fully.
Have held cond sale. Perhaps O.K. That cond advanced
for land is its fair value & not much less is so. that
not a mtge as mtges not made for full value.
note that if cond sale is no Eq. redemption, If
option to buy not exercised within time all its case.

*G. father mortgages to White
 Whiteheads mortgage to him
 G. father & father
 Trustees lease to father
 [CHAP. II. Provision for
 Held self can't release]*

omit

MELLOR v. LEES.

COURT OF CHANCERY, 1742.

(2 Atk. 494.)

This case came before the Chancellor upon an appeal from the Rolls.

A mortgage was made of an estate by the plaintiff's grandfather, Thomas Mellor, in 1689, to John and James Whitehead; the Whiteheads afterwards, on the 5th of June, 1689, mortgaged the same estate to Cartwright and John Heywood, and their heirs, for securing 200*l.* to which Thomas and his son John Mellor were parties; and Cartwright and Heywood, in order to secure to themselves the interest, made a lease to the plaintiff's father, John Mellor, dated the 12th of June, 1689, and to his assigns, for 5000 years, at the rent of twelve pounds a year, for the three first years, and ten pounds a year for the remainder of the term; and if in the space of three years the 200*l.* was paid, and the interest, then the premises were to be re-conveyed.

Receipts have been given since, sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730.

The 200*l.* lent, was money left under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee in Lancashire, or Cheshire, and the rents of it, when purchased, to be applied towards clothing 24 aged and needy house-keepers.

The plaintiff, the 20th of January, 1738, gave notice that he would pay in the money, but the defendant, a new trustee of the charity, refused to take it, and insisted upon it as an absolute purchase: and was so decreed by the Master of the Rolls, William Forrescue, Esquire.

The estate, at the time of the mortgage, was worth 500*l.* only, but would sell now for 900*l.*

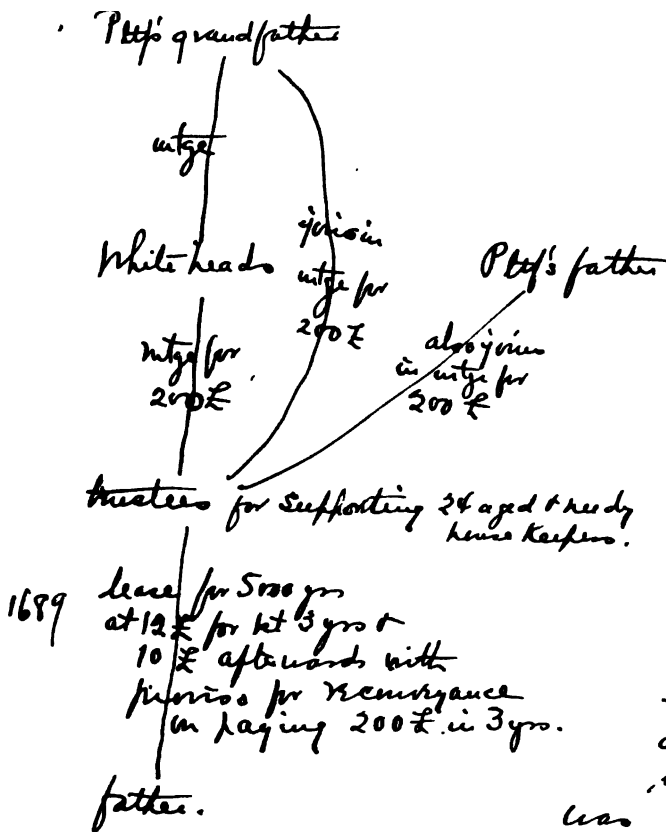
LORD CHANCELLOR [HARDWICKE]. To be sure, the rules of this court relating to mortgages ought to be adhered to, that borrowers of money may not be oppressed.

There are two general questions in the present case.

First, As to the contract, Whether it is a transaction that is in its nature a mortgage, or a defeasible purchase, and subject to a re-purchase?

Secondly, If originally intended as a mortgage, Whether length of time will not be a bar to redeeming?

As to the *first*, There is a difference between such an agreement as this, which relates to a rent-charge issuing out of land, and an



Receipts given for in or rent, called some times ^{one}, sometimes other, up to 1730.

For 1738 pltff wishes to redeem. Hele for debt, the trustees

Pltff can't redeem

Is not a utgr but a

creation of a rent-charge that cd be r.

purchased with in 8 years. If convey & d

rent charge by way of utgr, it wd be made

title seen secured in value ordinarily.

Then rent-charge is just about equal in value to sum lent. It evidently

was a purchase of the rent-charge. Trustees had

to get an estate in fee & not put 200£ at interest & to hold in conveyance of rent-charge is in acc. with this. Further is

no covenant to repay the 200£ which tho not conclusive is ev. that not utgr. Be-

sides pltff has delayed long in seeking to redeem. Money is worth less now &

if pltff pays 200£ & redeems the debt will not be able to interest that so as to

get 10£ a year. Again if not a utgr is a freehold & wd be so conveyed. If

a redeemable interest then penalty & dif. conveyance. Better to have it set-

tled so one can tell how to convey his int.

int.

Court treats case just as if the White heads, the H. father & the father being together the owner of all etc in property had granted a rent-charge to the trustees & the trustees had covenanted to convey it on payment of 200£ in 3 yrs. [Rent-charge was perhaps usually granted for a freehold estate & so ordinarily created

conveyed by deed since incorporeal. But if charge only for term of years then personally + deed not nec. if could or delivery. Here mgt to trustees conveying legal title to them & lease for 5000 go to father treated as conveyance of rent-charge. Was not And can't tell why. Ct said it was. Perhaps had repaying. Then Covenant in release to recovery in payment of 200£ in 3 yrs is agreement to recovery or option to repay the rent-charge.

Talks facts as Ct interpreted them. Was this a mortgage or a cend. Sale of rent-charge?

(1) Ct say price pd 200£ was just about a full cend. for such a rent-charge at that time. If had been a loan wd have insisted on a rent-charge of more value as security for 200£.

(2) Trust under which debts were acting for sale loaning the money. That is that they bought a rent-charge.

(3) No express promise to repay is important as if is prom. to repay then pretty clearly conveyance and usually be for security of that sum. But may be a mortgage tho no express prom. to repay. May be implied prom. And further a mortgage is good where there is no personal oblig but only oblig is in the land. At last.

Taking Ct's construction of instruments then their conclusion was O.K. probably. But fact that conveyance from Whitehead, J. father, & father ~~was~~ is stated to have been not an absolute conveyance but a mortgage makes it very questionable if Ct was really right.

Ct also say that even if a mortgage the rent.

do

See for 200 £
Seems taken as Conveyance from G. father & father.
in 500 yrs at 12 £ per 123 yrs & 10 £ after.
conveyance in paying 200 £.

SEC. I.]

MELLOR v. LEES.

149

agreement which relates to the land itself. So likewise the case of creating a rent-charge out of lands, and mortgaging a rent-charge, is of different considerations. Where a man takes a mortgage, it is not barely adequate to the payment of the interest, or even to a perpetual payment of the interest, but generally the estate is double the value of the principal money lent.

That estate is worth much more than price pd is arg. that is not so.

If, indeed, any fetters had been laid upon redeeming the mortgaged estate, by some original agreement, either in the mortgaged deed, or a separate deed, it would not avail, where it is done with a design to wrest the estate fraudulently out of the hands of the mortgagor. But where is the fraud, or the inconvenience, in the present case? The land itself is not parted with, but it is merely selling a rent-charge, strictly adequate to the consideration given, the 200 £., and instead of having a chance for the whole estate, the lender of the money is contented to buy the interest for ever, by way of rent-charge.

I have said thus much in general; and now I come to the particular circumstances in this case. From the agreement, and from the articles themselves in 1689, it appears plainly to be the intention of the parties that after the end of the three years the interest should be changed into a rent-charge, and be irredeemable. The objection is, that the court will not permit a clause in the same deed, or in another, which shall fetter the redemption; and the observation is very right, when applied to the case of a common mortgage.

intent of parties.

But what has been said by the defendant's council with regard to the charity, is very material (not that I will lay down a general rule with regard to all charity money lent on mortgage), for here a sum of 200 £. is left by one Sutton, which is not to be laid out at interest, but to be invested in land in fee-simple, so that the trustees of this charity, being under an inability of treating in the common way, have put it in this method, and it is the will itself that has laid a foundation for transacting it in this manner, and has delivered the defendants from the suggestion of oppression and imposition.

Lesson of trust forbade int. Had to be put in fee-simple.

It is material in the present case that here is no covenant in the deed for the repayment of the mortgage money, which shews a plain intention of purchasing a rent-charge. In general, indeed, this is no rule against redemptions in common and ordinary cases, though there is no such covenant; but here it is explanatory of the whole scheme and intention of the parties. The agreement is to take a rent-charge, at the rate only of 5 per cent. which was extremely fair, considering the interest of money kept up long after at 6 per cent.

No prom. to repay shows prob. not int. charge.

Floyer v. Lavington, 1 P. Wms. 261, is the only case that comes

near the present.¹ *Bonham v. Newcomb*, 2 Vent. 364, went upon a different reason, and is an exception out of the general rule.

I do not singly found my opinion upon the nature of the contract in the principal case, but on the great length of time, for this bill is brought at the distance of 48 years.

And though it is very true, that the court will not suffer a common and plain mortgage to be redeemed, where the mortgagee has been in perception of the rents and profits for a considerable time, because it would be making the mortgagee a bailiff to the mortgagor, and subject to an account; yet, in this case of a rent-charge, there would be no such inconvenience, for the person might easily account. But consider how much the value of money is altered since 1689, and likewise the value of the rent-charge. For if the purchaser was to reconvey his rent-charge now in 1742, he could not possibly purchase another with the 200*l.* that would produce more than 7*l.* a year; therefore if the person who had a right to redeem had come sooner, something more might have been said.

There is still another reason, that it would make property precarious; for if after the three years it became an absolute estate, then it is a freehold, and would be conveyed as such; if considered as a redeemable interest, then it is only personal estate; this would create great confusion, and render it very difficult for persons either to dispose of their property, or to settle what kind of conveyance is proper.

Therefore, this bill has been properly dismissed at the *Rolls*, not so much upon general rules as upon the particular circumstances of the case, and upon the likeness there is between this and the case of *Floyer v. Lavington*.

His Lordship affirmed the decree, but gave no costs of either side.²

¹ One for 800*l.* consideration grants a rent-charge of 48*l.* a year in fee, upon condition that if the grantor, during his life, shall give notice and pay in the 800*l.* by instalments—viz., 100*l.* at the end of every six months, and shall do this during his own lifetime, then the grant to be void. The mortgage was made about sixty years since, when the legal interest of money was eight per cent. Lord Chancellor Cowper was of opinion the rent-charge was not redeemable, and decreed the bill for a redemption should be dismissed.—*Floyer v. Lavington*, 1 P. Wms. 268.

² "This is a sale for an annuity absolutely, and not redeemable; but when they are redeemable, the court looks upon it as an evasion of the statute of usury and only a loan for money."—Per Lord Hardwicke, in *Floyer v. Sherard*, Ambler, 18.

"There is, indeed, a distinction in the nature of the transaction, between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the court leans extremely against contracts of this kind, where the liberty of repurchasing

Will see later
after account
of c. no obj.
has any how.

if his shows C
shd go on
lender's doctrine

How does set
thing it one
way more than
other make
away diff? C
that acts to this
Exact case no
matter which
view taken.
Besides every
case and diff.
for slightly
as to real aim

of parties & 5.
not settled
at all.

Length of
time viz
1/2 full
bill

rent charge
for 500 yrs
seems to be
personally
rather ab.
or is deemed
able.

of
of

to redeem is barred since pty has been
guilty of laches. Of course that may
be so. Change in value of money shows
that laches doctrine shd be allowed to
prevail here.

Last point of Ct seems plain. See note
in margin.

B/party is a person claiming that it is
a cond. sale — see ^{foot}note.

Form of trust deed adopted here. Creditors constantly trying some new expedient to do away with Eq. of redemption. see Chaplin in 4 H.L.R. 10-11. No matter what form parties put it in if really the land (or chattel) was given to secure repayment of money, then a mortgage. So as in other cases question here is purely one of real intent. Court says:

- (1) No covenant to repay. As we saw while not conclusive this is sv. Court seems to say that a personal oblig is nec. to a mortgage. That is not so.
- (2) Ct rightly say that introducing a trustee shd really have no influence.
- (3) 20 acres which were clearly conveyed absolutely were not separately conveyed says Ct. But has plain distinction as to them since they went directly to Lyles under conveyance trust did not.
- (4) No talk of a loan at all occurred. That is very strong sv. that mortgage not in mind.
- (5) Lyles did not usually lend money of some value.
- (6) Alexander, the vendor, did not resist the deed from trustees to Lyles. Fair weight.
- (7) Alexander, tho' aware of improvements by Lyles after the deed to him, never asserted that he still retained an int.
- (8) Made no mention of this prop. in his will.

But Ct said Contra:

- (1) Alexander in jail. Tends to show that easy talk adv. of him & so make him sign cond. Sale for mortgage.
- (2) Inadequacy of price is very important. But here on all sv. not clearly inadequate.

On whole Ct seems right in coming to conclusion, that was no idea of se-

SEC. 1.]

Paper was a conveyance to trustees to convey to Lyles if Alexander did not pay Lyles 700 £ rent if he did to convey to Alexander. Deft holds under Alexander.
CONWAY v. ALEXANDER. Lyles & pteffs¹⁵¹
Paper is form a sale with power to repurchase may be a wife or conditional sale acc. to intent of parties.
CONWAY v. ALEXANDER. *See as shown by all pteffs.*
(SUPREME COURT OF THE UNITED STATES, 1812. *the Circumstances.* 17 Cranch, 218.) *held a Sale here. See underlined.*

This was an appeal from the Circuit Court for the District of Columbia, sitting in Chancery, at Alexandria.¹

MARSHALL, Ch. J., delivered the opinion of the Court as follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire and John Allison of the third part. Robert Alexander, after reciting that he was seised of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of eight hundred pounds paid by William Lyles, and of the covenants therein mentioned, grants, bargains and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs, and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of £700 with interest from the said 20th day of March, 1788. And if the said Robert Alexander shall pay the said William Lyles on or before that day the said sum of £700 with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then

is made at the same time, concomitant with the grant, as it must be considered in this case; being part of the same transaction; the court going very unwillingly into that distinction, and endeavoring if possible to bring them to be cases of redemption. Although it is a different thing where the contract for liberty to repurchase is after a man has been some time in possession of an estate, and acting as owner under a purchase."—Per Hardwicke, Ld. Ch., in *Longuet v. Scawen*, 1 Ves. Sr. 402, 405 (1749).

¹ The statement of facts is omitted.

lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of £700; and to reconvey to Robert Alexander in the event of payment. Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th day of July, 1790, the trustees, by a deed in which the trust is recited, and that Robert Alexander has failed to pay the said sum of £700, convey the said land in fee to William Lyles. On the 23d of August, 1790, William Lyles, in consideration of £900, conveyed the said twenty acres of land and 140 acres of land to Richard Conway, with special warranty against himself and his heirs. On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land. Soon after this deed of partition was executed Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value and at considerable expense.

*this was all
the land.*

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles. The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed by that deed to trustees, which sale became absolute by the non-payment of £700, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Court of Chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves

Ct holds cond sale a matter of parties really intended to secure repayment, tho they plainly agreed to adopt cond. sale as way of doing it. Object is to protect borrowers from extortion. Like Ct refusing to give effect to cont. that shall be no eq. redemp. Up later.

If Cond Sale then when option to rebuy or time for rebuying terminates the Euth's right is gone. Is no eq. redemp.

of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not in itself conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secured. It is, therefore, a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the £700 on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it at least possible that a division might be useless.

Having made these observations on the deed itself the Court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a pre-existing

No current
to pay

Must be an
oblig. 14
late.

Emv.

Limited but
still prob.
no such
rule.

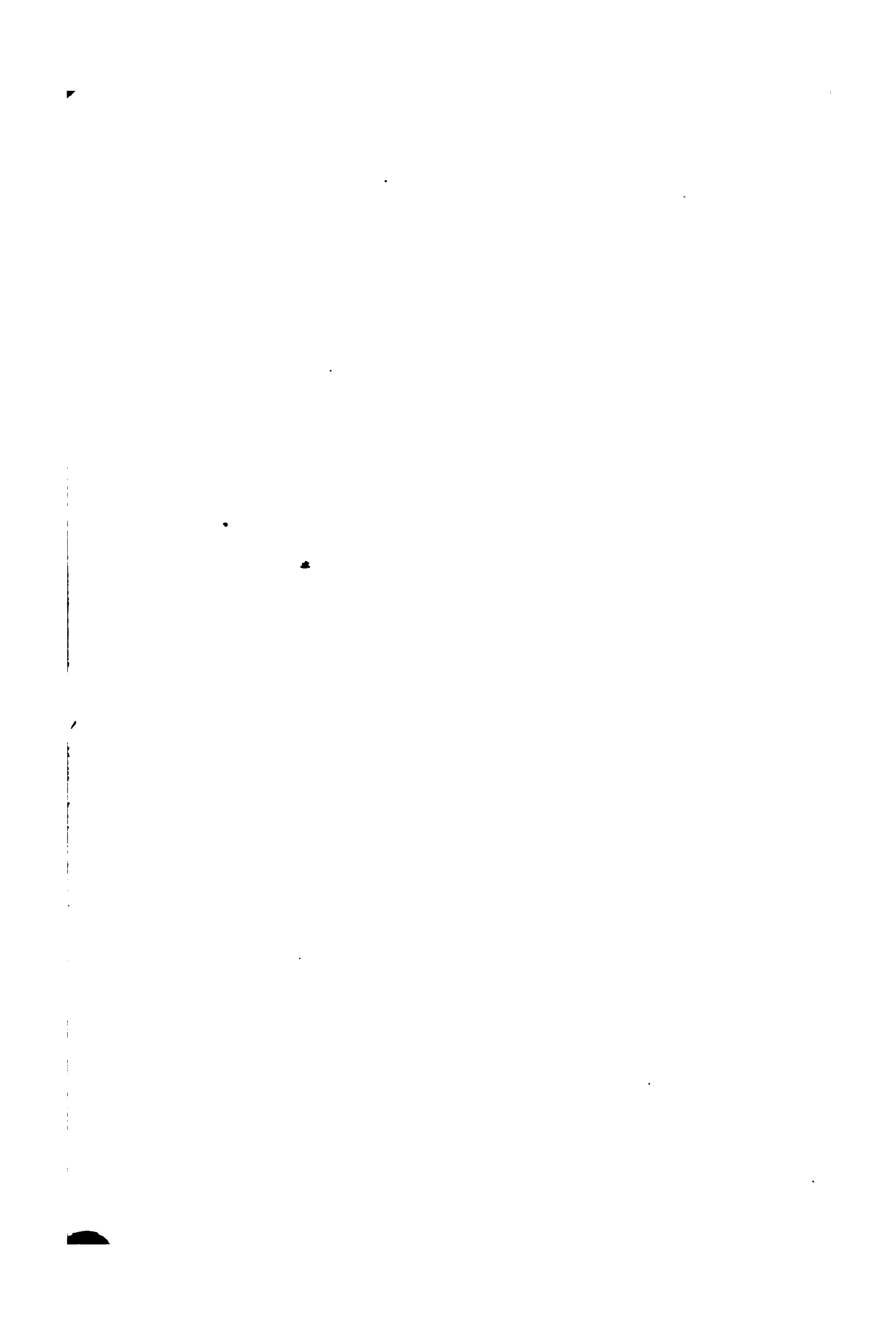
debt. The connection between the parties commenced with this transaction. The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage. The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource. To this circumstance the Court attaches much importance. Had there been any treaty, any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a Court of Chancery will invariably defeat. His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If he had considered this deed as a mortgage he would naturally have

*The talk of
a loan.*

*Lyles did
not usually
lend money*



resisted the conveyance, and it is probable that the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

*Apparently
Alexander
Consented
to deed.*

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

*He never
acted as
owner.*

*Did not
mention prop
in will.*

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional implies an expectation to redeem. A conditional sale made in such a situation at a price bearing no proportion on the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at £5 per acre conditionally, which, in fact, were worth £15, or £20, or £50 per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

in jail.

*Inadequacy
of price.*

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated. The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide. That twenty acres, part of the tract, were sold absolutely for £5 per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

*Price not
clearly
inadequate.*

It is, therefore, the opinion of the Court that the decree of the Circuit Court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.¹

Decree reversed.

of no value. Omit.

COYLE v. DAVIS, 116 U. S. 108 (1885). "The volume of proof taken on the issue thus raised is large, and the evidence is contradictory, as is common in such cases where, admittedly, a loan of some kind was at some time talked about. The conveyance to Davis of the undivided one-third interest of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance, either in the conveyance or in a collateral paper—the parol evidence that there was a debt, and that the deed was intended to secure it and to operate only as a mortgage, must be clear, unequivocal and convincing, or the presumption that the instrument is what it purports to be must prevail. This well-settled rule of equity jurisprudence was applied by this court in *Howland v. Blake*, 97 U. S. 624, 626. The case stated in the bill herein is not supported by the weight of evidence. On the contrary, it sustains the allegations of the answer. Especially, the force of the letter of

¹ *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138 (1833); *Rich v. Doane*, 35 Vt. 125 (1862); *Cornell v. Hall*, 22 Mich. 377 (1871); *Hanford v. Blessing*, 80 Ill. 188 (1875); *Randall v. Sanders*, 87 N. Y. 578 (1882).

Another form which money-lenders devised with the hope that it wd cut off the Eq. of redemption. But Equity ~~was~~ held that if real aim was security using this form wd not prevent its being a mtge. Whole rule is based on the presumed duress or unfairness arising out of the fact that borrower is likely to be in straits. Perhaps would have been better to enforce contract as made except where unfair dealing was established in fact. Could put burden of proof that no undue advantage taken on cred. If in fact unfair the whole transaction could be held void. able & the plt entitled to rescission & restitution any time, tho. after default, before his laches had barred him. But this not done. Court presumed unfair dealing absolutely w/o proof & despite proof to contrary & so held it a mtge wherever security intended. cf. with rule that breach of a prior contract is not such duress as will avoid a subsequent one made because of the pressure arising out of prior breach. Then cts did not go far enough here have gone too far.

Here on facts it seems right in concluding was a mtge. See underlined.

Looked at as a carrying out by a Court of Equity of real intent of parties this decision is wrong. Parol ev. rule wd pre- & as plainly parties have intended to

Coyle to Davis, of June 11, 1867, is not broken by any satisfactory explanation. It would serve no useful purpose to discuss the testimony at length. There is but one point to which it is needful to refer. Great stress is laid, in cases of this kind, on inadequacy of consideration where there is a considerable disproportion between the price paid and the real value of the property (*Russell v. Southard*, 12 How. 139, 148). There is testimony on both sides, on the question of disproportion, in this case. But the preponderance is very large on the part of Davis, that the share of Coyle in the property was sold for about its sale value, in view of its condition. There was a poorly built and poorly arranged building on the premises, which was incapable of actual partition; the law did not permit a partition by a sale *in invitum*, and Coyle's interest was a minority interest. These considerations made it difficult of sale at all."—*Per Blatchford, J.*

Als. deed & separate from to sell back at end of 4 mos. Held a mortgage. Price very inadequate - about 1/3 or 1/2. Parties talked of it as a loan. Was contract implied a fact to repay the

RUSSELL v. SOUTHARD.

SUPREME COURT OF THE UNITED STATES, 1851.

(12 How. 139.)

This was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

It was a bill filed by Russell, the appellant, to redeem what he called a mortgage, and the question in the case was whether it was a mortgage or conditional sale. The facts are set forth in the opinion of the court. Upon the trial the Circuit Court dismissed the bill, and Russell appealed to this court.

It was argued by *Mr. Underwood* and *Mr. Morehead*, with whom was *Mr. Clay*, for the appellant, and by *Mr. Nicholas* for the appellee.

MR. JUSTICE CURTIS delivered the opinion of the court.¹

This is a suit in equity to redeem a mortgage, brought here by appeal from the Circuit Court of the United States for the District of Kentucky.

On the 24th day of September, 1827, Russell, the complainant, conveyed, by an absolute deed in fee-simple, to James Southard, deceased, whose brother and devisee, Daniel R. Southard, is the

¹ Portions of the opinion, dealing with foreign questions, have been omitted.

principal party defendant in this bill, a farm, containing two hundred and sixteen acres, situated about two miles from the city of Louisville. At the time the deed was delivered, and as part of the same transaction, Southard gave to Russell a memorandum, the terms of which are as follows:

"Gilbert C. Russell has sold and this day absolutely conveyed to James Southard, said Russell's farm near Louisville, and the tract of land belonging to said farm, containing two hundred and sixteen acres, and the possession thereof actually delivered on the following terms, for the sum of \$4929.81½ cents, which has been paid and fully discharged by the said Southard as follows, viz., first two thousand dollars, money of the United States, paid in hand; secondly, the transfer of a certain claim in suit in the Jefferson Circuit Court, Kentucky, in the name of James Southard against Samuel M. Brown and others, now amounting to the sum of \$1558.87½; and thirdly, the transfer of another claim in the same court, in the name of Daniel R. Southard against James C. Johnston and others, now amounting to the sum of \$1270.94, as by reference to the records for the more precise amounts will more fully appear. The said Gilbert C. Russell has taken, and doth hereby agree to receive from said Southard aforesaid, two claims against Brown, &c., and James C. Johnston, &c., as aforesaid, without recourse in any event whatever to the said James Southard, or his assignor, Daniel R. Southard, of the claim of said Johnston, &c., or either, and to take all risk of collection upon himself, and make the best of said claim he can. The said James Southard agrees to resell and convey to the said Russell the said farm and two hundred and sixteen acres of land, for the sum of forty-nine hundred and twenty-nine [dollars] 81½ cents, payable four months after the date hereof, with lawful interest thereon from this date. And the said Russell agrees, and binds himself, his heirs, &c., that if the said sum and interest be not paid to the said James Southard, or his assigns, at the expiration of four months from this date, that then this agreement shall be at an end, and null and void; and the wife of said Russell shall relinquish her dower within a reasonable time as per agreement of this date. This agreement of resale by the said James Southard to the said Russell, is conditional and without a valuable consideration, and entirely dependent on the payment, on or before the expiration of four months from and after the date hereof, of the said sum of \$4929.81½, and interest thereon from this date as aforesaid. And this agreement is to be valid and obligatory only upon the said James Southard, upon the punctual payment thereof of the sum and interest as aforesaid, by the said Gilbert C. Russell.

"In witness whereof the parties aforesaid, have hereunto set their

put whole contract into the writings & so
cannot show their extrinsic intent.
Cannot go as reformation as reformation
only applies where parties are mistaken
and to the effect of their instrument. Here
knew just what it was & decided to
have it that way.

Further if you are going to alter the
agreement to recovery from me pro-
viding for a sale back to me pro-
viding for a remission on pay-
ment of debt might be thought
that St. Frds. in the road. Effect of
two agreements widely dif. The
one was in writing not the other.

Cases must go on separate head
of equity based on policy vs. letting
lender take advantage of borrower,
on a presumed extortion.

hands and seals, at Louisville, Kentucky, on this 24th day of September, 1827.

“GILBERT C. RUSSELL, [SEAL.]

“JAMES SOUTHARD, [SEAL.]

“Witness present, signed in duplicate—
J. C. JOHNSTON.”

The first question is whether this transaction was a mortgage, or a sale. . . .

The deed and memorandum certainly import a sale; the question is, if their form and terms were not adopted to veil a transaction differing in reality from the appearance it assumed?

In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practised, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold (*Conway v. Alexander*, 7 Cranch, 241; *Morris v. Nixon*, 1 How. 126; *Vernon v. Bethell*, 2 Eden, 110; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Edrington v. Harper*, 3 J. J. Marsh. 354).

Upon this important fact the evidence leaves the court in no doubt. The farm, containing 216 acres, was about two miles from Louisville, and abutted on one of the principal highways leading to that city. A dwelling-house, estimated to have cost from \$10,000 to \$12,000, was on the land.

In May, 1826, about 16 months before this alleged sale, Russell purchased the farm of John Floyd, and paid for it the sum of \$12,960. Some attempt is made to show, by the testimony of Mr. Thurston, that this sum was not paid as the value of the land; but what he says upon this point is mere conjecture, deduced by him from hearsay statements, and cannot be allowed to have any weight in a court of justice. There is some conflict in the evidence respecting the state of the fences and the agricultural condition of the lands at the time in question, but we do not find any proof that the lands had been permanently run down, or exhausted; and considering the price paid by Russell, and the amount expended by Wing, his agent, during the sixteen months he managed the farm, we think the evidence shows that, though the fences and buildings were not in the best condition, yet their state was not such as to detract largely from the value of the property. The consideration for the alleged sale was \$2000 in cash, and the assignment of two claims then in suit, amounting, with the interest

computed thereon, to \$2829.81, not finally reduced to money by Russell, till October, 1830, upward of three years after the assignment. Making due allowance for the state of the currency in Kentucky at that time, the worst effects of which seem to have been then passing away, and which must be supposed to have affected somewhat the value of the claims he received, as well as of the property he conveyed, we cannot avoid the conclusion that this consideration was grossly inadequate; and therefore we must take along with us, in our investigations, the fact that there was no real proportion between the alleged price and the value of the property said to have been sold. We have not adverted particularly to the opinions of witnesses respecting the value of the property, because they have not great weight with the court, compared with the facts above indicated; but there is a general concurrence of opinion that the value of the farm largely exceeded the alleged price.

It appears that Russell had intrusted the care of this farm to an agent named Wing, who had contracted debts for which Russell had been sued, on coming to Louisville from Alabama, where he resided. He was a stranger, without friends or resources there, except this farm, and in immediate and pressing want of about \$2000 in cash. Southard, though not proved to have been a lender of money at usurious rates of interest, is shown to have been possessed of active capital, and not engaged in any business except its management. Russell certainly attempted to sell the farm. Colonel Woolley testifies,—“Russell was anxious to sell; indeed he was importunate that I should purchase.” And a letter is produced by the defendant, D. R. Southard, written to James Southard, by Wing, containing a proposal for a sale. The letter is as follows:

“Sunday, Noon.

“SIR: Having had some conversation in relation to Colonel Russell’s plantation, I will take the liberty of submitting for your consideration, 1st, how much will you give for the place, crops, stock, utensils, and implements, or how much without the same, to be paid as follows: in one sixth cash in hand, the balance in one, two, three, four, and five equal annual instalments, which may be extinguished at any time with whiskey, pork, bacon, flour, hemp, bale rope, cotton bagging, at the New Orleans prices current, deducting therefrom freight accustomary. Mules and fine horses will now be taken at appraised valuation.

*Attempt to
Sell.*

“Respectfully yours, J. W. WING.

“MR. SOUTHARD.

“N. B.—Please leave an answer for me at Allan’s, say this evening.

Yours, &c., J. W. W.”

It does not appear that any price was spoken of between Russell and Colonel Woolley, who peremptorily refused to purchase; nor is any sum of money mentioned in this letter of Wing; but, bearing in mind Russell's necessity to have \$2000 in cash, the offer to take one-sixth cash, and the balance in one, two, three, four, and five annual instalments, indicates that Russell then expected about \$12,000 for the property, and had that sum in view as the price, when these terms were proposed. This offer to sell differs so widely from the terms of the written memorandum, that it certainly does not aid in showing that the actual transaction was a sale. Peter Wood testifies that he heard a conversation between James Southard and Colonel Russell, about the transfer of the farm from Russell to Southard, in which Mr. Southard proposed to advance money to Russell upon the farm; that Russell told Southard about what he had paid for the farm, \$13,000 or \$14,000, and that he should consider it a sacrifice at \$10,000; but no proposal was made to give, or take, any price for the farm. That some time after, Southard told him he had advanced Russell between \$4000 and \$5000 on the place, but that, in case he owned the place, it would cost him \$10,000. The general character of this witness for truth and veracity is attacked by the defendants, and supported by the plaintiff. His credibility finds support in the consistency of his statements with the prominent facts proved in the case. This is all the proof touching the negotiations which led to the contract; but there is some evidence bearing directly on the real understanding of the parties. Doctor Johnston was the subscribing witness to the written memorandum. He testifies that "James Southard and Gilbert C. Russell, I think on the same day, presented the agreement, and asked me to witness the same, which I did. My understanding of the contract was both from Southard and Russell, and my distinct impression is, that Russell was to pay the money in four months, and take back the farm." The intelligence and accuracy, as well as the fairness of this witness, are not controverted; and if he is believed, the transaction was a loan of money, upon the security of his farm. It is the opinion of the court that such was the real transaction. The amount and nature of what was advanced, compared with the value of the farm, the testimony of Wood as to the offer of Southard to make an advance of money on the farm, and his subsequent declaration that he had done so, and the information given by both parties to Doctor Johnston, that Russell was to pay the money at the end of four months, present a case of a loan on security, and are not overcome by the answer of Southard and the written memorandum.

It is true, Daniel R. Southard, answering, as he declares, from personal knowledge, sets out, with great minuteness, a case of

an absolute and unconditional sale; the written contract by his brother to reconvey being, as he says, a mere gratuity conferred on Russell the next day, or the next but one, after this absolute sale and conveyance had been fully completed. But this account of the transaction is so completely overthrown by the proofs, that it was properly abandoned by the defendants' counsel, as not maintainable. We entertain grave doubts whether, after relying on an absolute sale in his answer, it is open to him to set up in defence a conditional sale; but it cannot be doubted, that the least effect justly attributable to such a departure from the facts, is to deprive his answer of all weight, as evidence, on this part of the case.

In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten, that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage, and not a sale (*Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 2 Sumner, 533; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; *Crane v. Bonnell*, 1 Green, Ch. R. 264; *Robertson v. Campbell*, 2 Call, 421; *Poindexter v. McCannon*, 1 Dev. Eq. Cas. 373).

It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of the parties. "Necessitous men," says the Lord Chancellor, in *Vernon v. Bethell*, 2 Eden, 113, "are not, truly speaking, free men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them."

The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage (*Floyer v. Lavington*, 1 P. Wms. 268; *Lawley v. Hooper*, 3 Atk. 278; *Scott v. Fields*, 7 Watts, 360; *Flagg v. Mann*, 2 Sumner, 533; *Ancaster v. Mayer*, 1 Bro. C. C. 454). And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it

was the design of one of the parties to clothe the transaction with the forms of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan.

It has been made a question, indeed, whether the absence of the personal liability of the grantor to repay the money, be a conclusive test to determine whether the conveyance was a mortgage. In *Brown v. Dewey*, 1 Sandf. Ch. R. 57, the cases are reviewed and the result arrived at, that it is not conclusive. It has also been maintained that the proviso, or condition, if not restrained by words showing that the grantor had an option to pay or not, might constitute the grantee a creditor (*Ancaster v. Mayer*, 1 Bro. C. C. 464; 2 Greenl. Cruise, 82 n, 3). But we do not think it necessary to determine either of these questions; because we are of opinion that in this case there is sufficient evidence that the relation of debtor and creditor was actually created, and that the written memorandum ascertains the amount of the debt, though it contains no promise to pay it. In such a case it is settled, that an action of assumpsit will lie (*Tilson v. Warwick Gas-Light Co.*, 4 B. & C. 968; *Yates v. Aston*, 4 Ad. & El. N. S. 182; *Burnett v. Lynch*, 5 B. & C. 589; *Elder v. Rouse*, 15 Wend. 218). . . .

So was a
personal
liability.

The conclusion at which we have arrived on this part of the case is, that the transaction was, in substance, a loan of money upon the security of the farm, and being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage. . . .

A decree is to be entered, reversing the decree of the court below, with costs, declaring that the conveyance from Russell, the complainant, to James Southard, was a mortgage, and that Russell is entitled to redeem the same, and remanding the cause to the Circuit Court, with directions to proceed therein in conformity with the opinion of this court and as the principles of equity shall require.¹

¹ *Miller v. Thomas*, 14 Ill. 428 (1853); *Bearse v. Ford*, 108 Ill. 16 (1883); *Vos v. Eller*, 109 Ind. 260 (1886).

MATTHEWS v. SHEEHAN.

COURT OF APPEALS OF NEW YORK, 1877.

(69 N. Y. 585.)

Appeal from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought by plaintiff, as administratrix with the will annexed, of Dennis O'Keefe, deceased, to recover moneys alleged to have been collected by defendant upon a policy of insurance issued upon the life of said O'Keefe, and assigned by him to defendant as security for advances made by the latter.

The facts appear sufficiently in the opinion.

N. C. Moak for the appellant.

Esek Cowen for the respondent.

EARL, J. In December, 1869, an arrangement was made between the plaintiff's testator, O'Keefe, and the defendant, whereby O'Keefe was to procure a policy of insurance on his life from the Phoenix Life Insurance Company, and assign it to the defendant, who was to pay the premiums and have the benefit of the policy, with the understanding that if at any time O'Keefe desired to redeem the policy, he could do so by paying the premiums advanced by defendant, with the interest thereon. In pursuance of this arrangement, O'Keefe procured the company to issue a policy on his life, which was immediately assigned to the defendant by an assignment absolute in form, and he paid all the premiums to the time of O'Keefe's death in 1874. Before that time O'Keefe, for the purpose of redeeming the policy, offered to pay the defendant the amount advanced by him for the premiums, and defendant refused to take the money. After the death of O'Keefe, the defendant received from the insurance company the amount insured, and retained the same, refusing, upon plaintiff's demand, to pay any portion thereof to her. This action was brought to recover the sum received by the defendant, less the amount for which he held the policy as security. Upon the trial, the facts above stated appearing, and there being no conflicting evidence, the court directed a verdict for the plaintiff.

The verdict was properly directed. Upon the undisputed evidence, O'Keefe had the option to treat the policy as a security for the premiums paid by the defendant, and to redeem the same. While O'Keefe was not bound to redeem, or personally liable for the money advanced by the defendant, there was sufficient consid-

Facts.

*Held for plaintiff.
Has a right.
See under.
limited.*

Seems so!

eration for the arrangement made. O'Keefe submitted to examination, procured his life to be insured, and assigned the policy to the defendant in consideration that the defendant would pay the premiums and give him the option to redeem. The substance and legal effect of the transaction was to make the defendant a mortgagee of the policy to secure him for the premiums paid, and he could not claim an absolute title thereto, except upon O'Keefe's failure to exercise his option to redeem. This was not simply an agreement by the defendant to sell to O'Keefe, upon payment by him of the amount of the premiums advanced with interest, a policy absolutely belonging to the defendant, an agreement void under the statute of frauds, because there was no writing or part payment. It was an agreement that the defendant might take and hold the policy as security and the right to redeem attended the policy into the defendant's hands, and at all times affected his title. Such an agreement may be shown by parol, although the assignment be absolute in form (*Hodges v. The T. M. and Fire Ins. Co.*, 8 N. Y. 416; *Despard v. Walbridge*, 15 N. Y. 374; *Horn v. Keteltas*, 46 N. Y. 605; *Hope v. Balen*, 58 N. Y. 380).

St. Frds
point.

next section

It matters not that O'Keefe did not absolutely promise to pay the amount which defendant should advance for the premiums. To constitute a valid mortgage it is not essential that the mortgagee should have any other remedy but that upon his mortgage. This is recognized by the Revised Statutes in references to real estate mortgages (1 R. S. 739), which provide that when there shall be no express covenant in the mortgage for the payment of the money received, and no bond or other separate instrument to secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. In all cases the remedy of the mortgagee may by the agreement of the parties be confined to the mortgage.

OK.

OK.

It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. No general rule upon the subject can be laid down which will govern all cases, although it is said that the fact that there was no debt which could be personally enforced is a strong, but not an absolutely controlling circumstance, that the transaction was not a mortgage, but a sale and a conditional resale. In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale, because in the case of a mortgage the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, with-

out strict compliance, the rights of the conditional purchaser are forfeited (*Longuet v. Scawen*, 1 Ves. Sen. 402; *Glover v. Payn*, 19 Wend. 578; *Conway's Exrs. v. Alexander*, 7 Cranch, 218; *Edrington v. Harper*, 3 J. J. Marshall, 354; *Floyer v. Lavington*, 1 P. Wms. 268; *Chapman's Admin'x v. Turner*, 1 Colls. R. 280; *Wharf v. Howell*, 5 Binney, 499). In *Floyer v. Lavington*, it is said: "As to the objection that there was no covenant for the payment of the principal or interest, that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual, viz.: for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance, as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage." In *Brown v. Dewey*, 1 Sandf. Ch. R. 56, it was held that "the absence of the personal liability of the grantor to repay the money is not a conclusive test in deciding whether the conveyance is absolute or is intended as a security." In *Holmes v. Grant*, 8 Paige, 243, 257, Denio, V. C., says: "It is not essential that the personal remedy against the mortgagor should be preserved. There is a debt *quoad* the redemption, but not in respect to the personal remedy." In *Flagg v. Mann*, 14 Pick. 467, Putnam, J., says: "There was no collateral undertaking on the part of Luther (the grantor) to pay the money which Walker and Fisher (grantees) should advance in the five years; so there was no mutuality. And this fact, though not conclusive, is to be taken into consideration in ascertaining whether the transaction was a mortgage, or a sale with a contract for a repurchase upon strict terms. (See also *Rice v. Rice*, 4 Pick. 349.) In *Kerr v. Gilmore*, 6 Watts, 405; Kennedy, J., says: "The want of a personal security for the repayment of the money has, taken in connection with other circumstances, been regarded as tending to show that a defeasible purchase and not a mortgage was intended, but this circumstance alone has never been held sufficient to prevent a redemption." Again, "that the mortgagee should have a remedy against the person of the mortgagor also, in order to make the conveyance a mortgage, is more than I can assent to." . . . In *Horn v. Keteltas*, *supra*, Allen, J. says that the circumstance that there was no agreement to pay the money secured is one entitled to considerable weight in determining whether a conveyance was intended as a mortgage, but that it is only one of the circumstances to be considered, and not conclusive; and Ch. J. Marshall, in *Conway's Exrs. v. Alexander*, 7 Cranch, 218, says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance."

Sound case. Here again absolute emergency
& separate defeasance but that immaterial.
p. 170. Ct says personal liability - unrec.
but was implied cont. here. Prob. right.

As to whether mortgage:

(1) Language so. 171.

(2) Debt must pass it cond. sale. 171

(3) That grantor to remain in pos so,
especially if at nominal rent is
strong. 171

(4) If W. & L. not bound to pay prior mortgage
no consid. & so consid. grossly in-
adequate. p. 172

Seem clearly a mortgage.

Top of 172 says perhaps one co-assignee ed
not buy in outstanding title & so must
other. That true. Tiffaney, Real Prop. 398. Prob.
a bad rule, however.

In final P Ct say that anyhow perhaps if
papers show a mortgage cannot by parol
show it was a cond. sale. That also
is probably true & of course ok. as
in acc. with parol ev. rule. Excep-
tion for showing sale a mortgage but
none the other way.

It is clear, therefore, both upon principle and authority, that the circumstance that O'Keefe was not personally obligated to pay to the defendant the amount of the premiums which he should advance is not absolutely controlling upon the question, whether there was a mortgage, or a sale and a conditional resale. It is an important circumstance in such cases and, in the conflict of evidence, not unfrequently a controlling one. There are many cases, some of which are cited by the learned counsel for the appellant, in which it has been held to be not as matter of law conclusive, but as matter of fact decisive. If we should hold this to be a case of conditional resale, and that the consequence follows which has been so learnedly argued on behalf of the defendant, that the agreement is void under the statute of frauds, the intention of the parties would be defeated. This is, therefore, a case where the court should lean to hold the transaction to constitute a mortgage, thus giving what was clearly intended, the right of redemption.

There was nothing said about a repurchase or a resale, or a reassignment, but the right to redeem was expressly stipulated. The language used shows that the parties intended that the policy should be held as security for the premiums paid. Such a construction is at least as admissible as any other, and hence the court did not err in directing a verdict for the plaintiff.

I have treated the transaction as a mortgage, but it is unimportant to determine whether it was a mortgage or a pledge, as the same course of reasoning would apply and the same consequences would follow, whether it was one or the other. The judgment must therefore be affirmed.

All concur.

Judgment affirmed.

Bill in equity.

FLAGG V. MANN, 2 Sumn. 486 (1837). On the 14th of May, 1825, Luther Richardson conveyed certain premises in Lowell, which were then subject to incumbrances in favor of Joshua Bennett and others, to his brother Prentiss Richardson by a deed of quitclaim and upon a secret parol trust for the benefit of Luther. On the 6th of May, 1826, Luther Richardson and his wife and Prentiss Richardson executed a deed of quitclaim of the premises to Walker and Fisher, for the consideration of \$2000 (as stated in the deed), and on the same day Walker and Fisher executed a bond for \$10,000 to Luther Richardson alone, which provides that the obligees shall reconvey the premises to Luther Richardson whenever, within five years from date, he shall repay them such sums of money as they shall expend in discharging incumbrances and making improvements on the land. At the same time Walker and

*But 2 more p^{re}-
tion. See next
page.*

Fisher executed to Luther Richardson a lease of a part of the premises for five years upon the annual rent of one cent during the term, unless the premises should be previously redeemed according to the provisions of the bond. A few days after this transaction, Walker and Fisher took from Bennett a quitclaim deed of all his right in the premises, and shortly thereafter they took assignments of several mortgages to which the property was subject, and thus became the exclusive owners of the premises, subject only to the right of redemption of Luther Richardson under their bond to him, above referred to.

Apparently Richardson assigns bond to Walker & Fisher, calling all a mortgage. Mann got out of W. & F. 15 Sept. 1872. See p. 172.

The question was whether the conveyance by the Richardsons to Walker and Fisher, connected with the other papers and circumstances, amounted to a mortgage or to a conditional sale of the premises.¹

Held a mortgage.

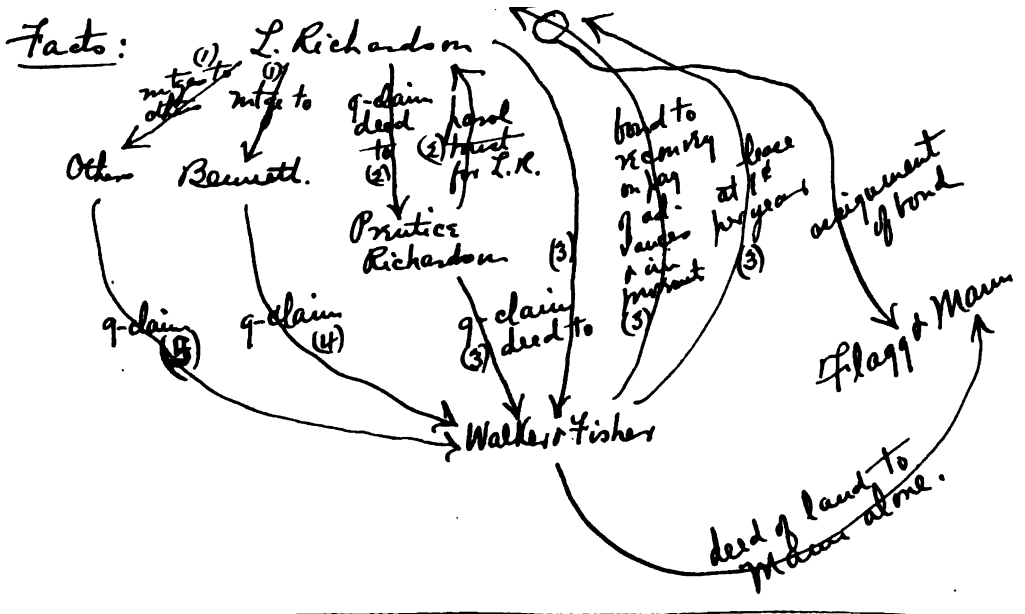
STORY, J. (531.) Did, then, the transaction between the Richardsons and Walker and Fisher create a mortgage in the premises? Some things are, to my mind, exceedingly clear. In the first place, the deed to Walker and Fisher, and the bond by them to Luther Richardson, are to be treated as part of one and the same transaction. They were, in my judgment, executed at the same time; and if not, at all events they were intended to be contemporaneous in their object and operation. Neither was to be of any force or validity without the other. The bond must have the same precise effect and construction, as if it were inserted in the body of the deed. If, by being so inserted, a mortgage could be created, it was equally created by its being in a separate instrument. In the next place, no consideration whatsoever was paid by Walker and Fisher to Luther or Prentiss Richardson, on account of the deed, at the time of the execution of it, or has been at any time since. It is true, that there is the consideration of the thousand dollars stated in the deed; but it was purely nominal. No person pretends that that sum or any other sum was in fact paid, or intended to be paid. If this were the whole case, the deed would be merely voluntary; and the question of a conditional purchase could never arise; for to constitute a conditional purchase, there must be a sale for valuable consideration between the parties, with a right of repurchase. A mere gift would not raise the question; and, indeed, there is no pretence in the present case to say that any gift was intended.

2000?

2000? Sd to be considered in equity petition.

What, then, was the real consideration between the parties? To me it appears plain, that there was an agreement by Walker and Fisher, at the request and for the benefit of Luther Richardson, to pay off forthwith the incumbrance of Bennett on the premises, and thereby to save the equity of redemption from being totally extin-

¹ The facts here stated are extracted from the elaborate report of the case, pp. 486-493.



guished. On the part of Richardson, there was an agreement to convey the premises to Walker and Fisher, to secure the payment of this advance and all other advances made by them toward the extinguishment of the antecedent mortgages and all expenditures in improvements, with a right reserved to Richardson of reconveyance upon his repayment thereof within five years. This was the basis of the papers actually executed; and the whole transaction would otherwise be without any just aim or object. Bennett's title to the premises would become in a few days absolute, unless he was redeemed. Richardson was, notoriously, unable to redeem from his own funds, and that inability constituted the ground of the application to Walker and Fisher. It would have been the idlest of forms, and the most useless of contrivances, to shift the title from Prentiss Richardson to Walker and Fisher, if it was the design of all parties that it should perish in the space of twelve days, without any attempt of redemption. The very nature of the transaction demonstrates to my mind, that the redemption of Bennett by Walker and Fisher was the *sine quâ non* of the whole arrangement. If there could be the slightest doubt upon this head from reading the testimony of Walker and Fisher, it would be entirely removed by the other evidence and by admitted facts. Bemis says that about the time the papers were finishing, Bennett passed in the street, and was called in; and Walker and Fisher requested Bemis to ask Bennett to appoint a time when they should meet him at Billerica and pay him the money. He did so and Bennett appointed the time. And on the day so appointed, Walker and Fisher and Richardson and Bemis met at Billerica, and the money was paid by Walker and Fisher, and the deed was accordingly executed to them by Bennett. This is as pregnant and conclusive a proof of the real nature of the transaction as can be desired.

Upon this posture of the case, what ground is there to say that there was a conditional sale of the premises to Walker and Fisher? They paid nothing to Luther Richardson for any transfer of his right to them. They simply paid, at his request, a subsisting debt due from him to Bennett, and took a transfer from Bennett of his interest in the premises. Beyond this they paid nothing; and upon the reimbursement of this and all other advances on account of the premises, within five years, the premises were to be restored to Richardson. It was in truth but the transfer of a debt from one creditor to another, with the assent of the debtor, expanding the equity to redeem the estate pledged for it from a few days to five years.

It has been said, that the true test, whether the conveyance in this case was a mortgage or not, is to ascertain whether it was a security for the payment of any money or not. I agree to that; and

indeed, in all cases the true test, whether a mortgage or not, is to ascertain whether the conveyance is a security for the performance or non-performance of any act or thing. If the transaction resolve itself into a security, whatever may be its form, it is in equity a mortgage. If it be not a security then it may be a conditional or an absolute purchase.

It is said that here there was no loan made, or intended to be made, by Walker and Fisher to Richardson; and that they refused to make any loan. There is no magic in words. It is true that they refused to make a loan to him in money. But they did not refuse to pay for him the amount due to Bennett and to take the premises as their security for reimbursement within five years.

It is said that there is no covenant on the part of Richardson to repay the money paid, which should be paid by Walker and Fisher to discharge the incumbrances on the premises. But that is by no means necessary in order to constitute a mortgage, or to make the grantor liable for the money. The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important to ascertain whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*. The doctrine is entirely well settled; and for this purpose it is sufficient to refer to *Floyer v. Lavington*, 1 P. Will. R. 270, 271; *King v. King*, 3 P. Will. R. 360; *Longuet v. Scawen*, 1 Ves. R. 406; *Mellor v. Lees*, 2 Atk. R. 496; *Goodman v. Grierson*, 2 Ball & Beat. R. 278, and *Conway's Ex'rs v. Alexander*, 7 Cranch R. 237, out of many cases. Now, it seems to me clear, upon admitted principles of law, that, upon the payment of the money due to Bennett by Walker and Fisher, Richardson became their debtor for that amount, as it was paid at his request, and for his benefit. It is a common principle, that if A., at the request of B., pays a debt due by him to C., A. may recover the amount in assumpsit for money paid to his use, or for money lent and accommodated. In my judgment, that is the very case at bar.

If it should be asked why no personal obligation was given by Richardson on this occasion to pay the money, it might be answered that the whole circumstances of the present case show an extreme looseness in the transaction of business between the parties; and considering that much of it was done by the advice and with the assistance of counsel, it is not very creditable to the skill and diligence of the profession. The negotiations between Flagg and Mann and Richardson evince a most obstinate carelessness in the draft and execution of important instruments, leaving much to personal confidence and the imperfect recollections of the parties, as

So personal liability not nec.

But was personal liability here.

Cont. imp. in fact to repay.

well as that of the witnesses. And there is no ground for surprise in finding the same laxity pervade the arrangements of Richardson with Walker and Fisher. But the satisfactory answer is that Richardson was poor and embarrassed, and Walker and Fisher relied on the premises for a full indemnity and satisfaction of all their advances, believing that Richardson would never be able to redeem. They were indifferent about the personal obligation, as they possessed an adequate fund in their own hands.

It is well known that Courts of Equity lean against construing contracts of this sort to be conditional sales: and, therefore, unless the transaction be clearly made out to be of that nature, it is always construed to be a mortgage. So Lord Hardwicke laid down the doctrine in *Longuet v. Scawen*, 1 Ves. R. 406, and it has never been departed from. The *onus probandi*, then, is on the defendants to establish it to be a conditional sale. If it be doubtful, then it must be construed to be a mortgage.

Deft. must
prove it a
Cond. Sale.

If we look to the condition of the bond, it is difficult to resist the impression that it is precisely in its terms such as would be appropriate if the conveyance were a mere mortgage to secure future advances to be made by Walker and Fisher in discharge of the incumbrances referred to in the recital. The language of the accompanying lease points to the same conclusion. The dwelling house and garden (a valuable part of the premises) were let to Richardson for five years at a nominal rent; a proceeding not easily reconcilable with the notion of a positive purchase, but quite reconcilable with the notion of a mortgage. That lease contains some language not without significance on this subject. The lease is "for the term of five years from this date, yielding and paying therefor the sum of one cent annually, unless the said premises shall be redeemed by the said Luther, agreeably to the provisions of a bond bearing even date herewith from Walker and Fisher to said Luther." I do not lay great stress upon the word, "redeem," in this lease, as conclusive in regard to the understanding of the parties, though it is a word peculiarly appropriate to the case of a mortgage; for it is sometimes used as equivalent to "reconvey." But, certainly, it is not without weight in a case of this nature; and it was relied on by Lord Hardwicke in *Lawley v. Hooper*, 3 Atk. R. 278, as indicative of a mortgage. But the fact that Walker and Fisher were not to go into possession of the entire premises, but that Richardson was to retain the possession of a valuable portion for five years, without payment of any rent, is certainly important. It is remarked by Mr. Butler, in his learned note to Co. Lit. 204, b, that the circumstance that the grantee was not to be let into immediate possession of the estate, affords a presumption of its being a mortgage.

Language
looks like
mortg.

W & F not to
have pos.
but R. to have
pos. of mortg.
if it was not

It is not unimportant, also, that, in the very assignment made |

of the bond by Richardson to Flagg and Mann, the conveyance to Walker and Fisher is expressly described as a mortgage. And supposing that assignment to be a valid and subsisting instrument, it is not easy to see how Mann can now be permitted to set up that conveyance as an absolute estate to defeat the rights of his co-assignee, he having purchased in the title for his sole account.

But what strikes me as most material in this case is the allegation by both Walker and Fisher in their testimony that notwithstanding the conveyance to them, they did not contract, and were not bound, to pay off any of the incumbrances. If this were true, there would be an end of treating it, as has been already suggested, as a conditional purchase. I have endeavored to show that they were positively bound to pay off Bennett's incumbrance. In regard to the antecedent mortgages, they positively deny that they engaged to pay them off. Now, if this be true, it would be impossible to consider this as a conditional purchase without the grossest injustice. The purchase would be for little less than a tenth of the value of the property; for Richardson would still be personally bound for the payment of those mortgages. Nay, he would be bound to pay to Walker and Fisher, as the assignees of those mortgages, and now to Mann, as their assignee, the full amount due on those mortgages, notwithstanding the extinguishment of his title in the premises, by the lapse of the five years. Those mortgages, in their view of the matter, are still subsisting mortgages, capable of being enforced at law, and were not to be extinguished by the purchase and assignment to themselves. So that, if this be admitted to be the true interpretation of the whole arrangement, Walker and Fisher obtain property, confessedly worth, in their own opinion, more than \$10,000, by the payment, at most, of the sum of \$1200 only, to Bennett. I have not heard any such doctrine contended for at the argument, although it seems to me a natural consequence from the positions assumed. If the mortgages were not agreed to be extinguished by Walker and Fisher when they took the conveyance, nothing has since been done by the parties to extinguish them. On the other hand, if that transaction was a mortgage, the whole proceedings are, in legal operation, exactly what they should be. The debt to Bennett and the mortgages constitute a subsisting lien on the premises; and they must be paid by Richardson, before he can claim a reconveyance. Now, it has been well remarked by Mr. Butler, in the note above cited (Co. Litt. 204, b, note 1), that if the money paid by the grantee is not a fair price for the absolute purchase of the property conveyed to him, it affords a strong presumption that the conveyance was a mere mortgage. The same suggestion was pointedly made in *Conway's Ex'rs v. Alexander* (7 Cranch, R. 241).

←
If W & F not
bound to
pay price
w/ in R
remained
liable &
the price
for deed
wd be
grossly
small.

But if Richardson pd off those mtgs he would
be subrogated to them. ~~to~~ and so not as bad
as it seems to think.

So Bennett's mtge was 1200⁰⁰.

On the contrary, if, in opposition to the positive testimony of Walker and Fisher, we are to deem it a part of the agreement at the time of the conveyance to them that they should pay off the mortgages, having their security for their advances upon the premises, then the same considerations apply to this as to the payment to Bennett. The payments so made were for debts of Richardson, and paid at his request.

I observe that the assignments of these mortgages to Walker and Fisher speak of the debts as subsisting debts, and the mortgages as liable to be redeemed by Richardson; and Walker and Fisher are authorized to receive the sums due thereon for their own use.

But it is said, that it was distinctly understood, that the conveyance should not be a common mortgage; and that the premises should be irredeemable after the five years; and that the shape which the negotiation took was for the very purpose of accomplishing this object. Be it so; still if in fact the conveyance was a mere security for advances to be made to Richardson, and the premises were redeemable upon payment of these advances within the five years, in contemplation of law it was a mortgage, whatever name the parties might choose to give to it. Nothing is better settled than the doctrine, that where the conveyance is a mere security, it is a mortgage; and that if it be a mortgage, the parties cannot—by their agreement that there shall be no equity of redemption after a limited time—change the rights of the mortgagor. The common maxim is, *once a mortgage, always a mortgage*. The right to redeem is a necessary incident, and cannot be extinguished by a mere covenant that it shall not be claimed after a limited period. It seems to me that the shape of the transaction was merely to evade the principles of law applicable to mortgages. Walker and Fisher were willing to make advances to pay Richardson's debts, and to reinstate him in his equity of redemption. They were willing to give him five years to repay the advances and redeem the estate. But they meant, after that lapse of time, to hold the estate, if unredeemed, by an absolute title. This appears to be the manner in which Bemis understood the transaction; and the only mistake in the matter has been a mistake of law. Luther Richardson's own testimony points still more distinctly to the transaction as being a mortgage in contemplation of law, whatever might have been the understanding of the parties as to its redeemable quality. The negotiation, according to his statement, began in asking a loan and ended in an agreement to pay off all the incumbrances, taking the conveyance for the repayment within five years.

There is an intrinsic difficulty in treating this transaction as a conditional sale, in whatever manner the circumstances are viewed. It seems to be of the very essence of a sale, that there should be a

*Taken if
not*

*Could not be
a cond
sale as
no price.*

fixed price for the purchase. The language of the civil law on this subject is the language of common sense. *Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest*, say the Institutes (lib. 3, tit. 24). Ulpian, in the Digest, repeats the same suggestion; *Sine pretio nulla venditio est* (lib. 18, tit. 1, c. 2). Now, here is not the slightest proof, in this case, of any sum being agreed on as the price of the purchase. No money was in fact paid; and if Walker and Fisher are to be relied on, none was contracted to be paid; and even the incumbrances were not to be discharged. The money which was to be repaid on the reconveyance, was only what had been, in the intermediate time, actually paid to discharge the incumbrances and expended in improvements. If none had been so paid, none was to be repaid. So that not only was there no fixed price; but the premises stood as a mere security for future advances.

Hitherto the case has been considered, upon the question of mortgage or not, upon the footing not merely of the conveyance and bond, but of the parol evidence admitted as explanatory of the intent of the parties. It has been suggested, however, on behalf of the plaintiff, that as the papers, upon their face, taken together, do actually import a mortgage, it is not competent to admit parol evidence to control their legal effect. There is weight in the objection; for, in my judgment, the papers, taken together, do distinctly proclaim the case to be a present mortgage for future advances. But it is unnecessary to consider this objection, as the same conclusion is arrived at upon a full survey of all the parol evidence and circumstances attendant upon the transaction.

Sw.

Well settled that absolute deed can be shown to be a utge. Impossible to sustain this on any genl principles as to parol evidence rule. & St. Frd. Perhaps parol Ev. rule may be avoided. Evidently parties did not intend to put whole transaction into writing. Intended a separate defeasance. Did not intend to put that into deed. But how about St. Frd. No agreement in writing to reconvey on any terms. Surely an agreement to reconvey is a contract concerning an interest in land. Reformation will not help as parties knew that deed did not have the effect of requiring a reconveyance. Must be supported, like cases in last section, on grd that Ct of equity will not allow Cred. to take advantage of borrower. Relation is such that if security intended & absolute conveyance given unfair dealing is pre-
 sumed whether present or not. But Ct instead of applying usual remedies by making cont. voidable & allowing rescission thought it better to turn it into a utge. See margin 76*

Prob. dec. of Ct that this was not a utge was correct. Strongest ex. Contra was the covenant not to make partition. That very strong. Shows parties that the grantor still owner. But (a) parties called money pd. late purchase money. (b) was a later agreement for redemption. (c) Amt pd was about full price of grantor's int. (d) Grantor did not continue in pos but 2 yrs later grantor created co-tenant who was in pos. & grantor made no complaint.

A doubtful case but settled now that Othello is on one who declares abso. deed a

See notes p. 199.

See notes p. 180.

But under Haumbury v. Young or ab. deed. it seems to be a complete defeasance. a separate rule of C. v. D. is in writing. Still can show a separate rule not in writing. But theory N.Y. 4. COTTERELL v. PURCHASE. 175

CHAPTER II. (Continued).

SECTION II. ABSOLUTE DEED—PAROL EVIDENCE.

omit.
COTTERELL v. PURCHASE.

COURT OF CHANCERY, 1734.

(Cas. temp. Talb. 61.)

on facts held intge not intended. Fact looked at.

This Conceded a mty

This the conveyance in?

The plaintiff and her sister being seised of an estate in Yorkshire as jointenants, the plaintiff by lease and release, in consideration of 104l. conveys the moiety to the defendant and his heirs: but it was admitted, that the conveyance (though absolute in law) was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Sometime after, in the year 1708. those deeds were cancelled; and in consideration of a farther sum, which made up the whole 184l. she conveys the estate in manner as before, but with this farther covenant, That she would not agree to any division or partition of the estate, or make, or cause to be made, any division or partition thereof, without the licence, consent, advice and appointment of him the said Benjamin Purchase. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710. when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed it quietly till 1726. at which time the plaintiff filed her bill to [be] let into redemption; to which the defendant pleaded himself an absolute purchaser for a valuable consideration; and in 1732. the cause coming to be heard upon the merits, the Master of the Rolls was of opinion, that the deeds of 1708. amounted to an absolute conveyance; and dismissed the bill.

also left against in 1710 to let pay. & decem. 176 ->

For the defendant were given in evidence several particulars to shew that by the deeds of 1708. the parties intended an absolute conveyance of this estate. And it was insisted that as the deeds were an absolute conveyance in law, by the statute of frauds no trust or mortgage could be implied without an agreement in writing. And they insisted likewise, that as the defendant had been in possession ever since the year 1710. the plaintiff was barred of the redemption by the statute of limitations.

It was said on the other hand for the plaintiff, That the de-

* True resulting trusts are good but this is not a trust. Resulting trusts (where trust declared does not use of property or where no large purchase price & another takes title) are cases where parties supposed to be intended to have trust. ^{So 176} Defendant to have conveyance with it as security for debt.

defendant's plea admitted the first conveyance made in consideration of the 104*l.* to be intended but as a mortgage; and that the second conveyance was in the same form, excepting the covenant; and that it was therefore probably intended in the same manner. That as to the covenant, it made strongly for the plaintiff; since to suppose a person would absolutely sell away his estate, and then covenant not to make a division of it, is absurd. That the statute of frauds makes nothing against the plaintiff; this being in nature of a resulting trust, and so within the proviso in that statute. Nor can the statute of limitations affect the plaintiff; since in cases of redemptions the court always gives what it thinks a reasonable time. And though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances; yet that rule cannot affect the plaintiff, who did not lose possession till 1710. and brought her bill in 1726.

LORD CHANCELLOR [TALBOT]. The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case: for, to suppose that it is an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance; so that it is of no great weight, and must be laid out of the question. Then as to the circumstances; on one side has been shewed an account stated of money received; and it is there said *so much received on account of purchase money*, and in another general account the sum of 184*l.* is called *purchase money*. Then as to the agreement in 1710. that if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest, and the costs he had been at: this shews it was not redeemable at first. There have been strong proofs on both sides as to the value: one has shewn the rent to be but 27*l.* per ann. and then deducting one third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be 40*l.* per ann. But I rather give credit to the first; because it is certain the dower was but 9*l.* per ann. So that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance; otherwise, the length of time would not have signified: for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud; and no length of time will

utgee & he must establish his case by clear
ev. & so case probably right.

As to St. Louis. Rule is, that Court of Eq.
will not allow redemption if utgee has
been in adverse pos. for long enough to
bar action for recovery of real property.

May assume with Court that Maro. had jurisdiction to foreclose or redeem mortgages such at law but no ^{eq.} jurisdiction to hold anything a mortgage that was not one at law.

Was this a good mortgage at law? Author. it is in acc. with case that was not.

To be a legal mortgage must have defeasance part of same transaction and of same kind of document as conveyance.

Can see that must be all one transaction or else conveyance once took effect absolutely. The defeasance then wd be a mere contract - i.e. it wd not make

conveyance conditional or reduce it to a lien as in N.Y. where really a mortgage wd merely be enforced acc. to terms, probably, the little authority.

But why does it have to be of same rank as the conveyance. Evid. parties intended to put transaction in two documents, not one to paral. ev. rule satisfied. Clearly also the writing satisfies St. Fords. Must be another case of notion that sealed instrument can only be affected by another sealed instrument. Cases give no reason. Simply say must be of a high nature to assist to an ~~equity~~ legal mortgage.

But ~~seems to be~~ ^{perhaps in} law that deed with defeasance tho' a mortgage at law conveys legal title even in lien states. ^(and) of course in case of ~~eq. mortgage~~ legal title is in mortgagee sub in lien states. If abso. conveyance at law but mortgage in eq. of course mortgagee has legal title - even in lien states.

bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant; yet it is not like making an entry and then lying still; for, in the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it; but I think it a wrong way; and, to me, it will always appear with a face of fraud: for, the defeazance may be lost; and then an absolute conveyance is set up. I would discourage the practice as much as possible.¹

Upon the circumstances of the case, affirmed the decree, &c.

written
Absolute deed under Seal. Unsealed defeasance. *Drift upon latter in Ex. Repeated. Held rightly. In Ex. it wd defeat make deed intge.*

KELLERAN v. BROWN. But Mass Ct has not

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1808.

(4 Mass. 443.)

This was a writ of entry, and upon the general issue pleaded was tried before Thatcher, J., September term, 1806, when a verdict was rendered for the demandant.

In support of the action, the demandant read in evidence a deed of Timothy Manly conveying the land demanded to the demandant in fee.

The tenant, in defence of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises as his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz.: "Thomaston, May 26, 1800. I, Edward Kelleran, the subscriber, having purchased of Timothy Manly a lot of land lying in said Thomaston, containing fifty acres (being the lot which the said Manly purchased of Ebenezer

do this. A good C. L. defeasance must be of equal rank as deed (under Seal) made at same time & cont. Sided, fail y deed. This was not under Seal.

¹ "So where an absolute conveyance is made for such a sum of money, and the person to whom it was made, instead of entering and receiving the profits, demands interest for his money and has it paid him, this will be admitted to explain the nature of the conveyance."—Per Lord Ch. Nottingham, in *Maxwell v. Lady Mountacute*, Finch, Pre. Ch. 526 (1719).

"Suppose a person who advances money should, after he has executed the absolute conveyance, refuse to execute the defeasance, will not this court relieve against such fraud?"—Per Lord Ch. Hardwicke, in *Walker v. Walker*, 2 Atk. 98 (1740).

Bly) for which I have received a warranty deed; but if the said Manly shall repay me the the sum of four hundred dollars, with the lawful interest on the same in one year from the date hereof, I then will reconvey the said lot of land to him. Edward Kelleran;" and also offered to prove to the jury that the tenant, Brown, at the time of the commencement of this action, and for a long time before, was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

The demandant's counsel objecting, the judge rejected said agreement and evidence, as inadmissible. To which opinion of the judge the counsel for the tenant excepted, as erroneous; whereupon the cause stood continued for the opinion of the Court upon the said exceptions.

At last June term in this county, the cause was briefly spoken to by Mellen in support of the exceptions, and thence continued for advisement, and now the opinion of the Court was delivered by

PARSONS, C. J. The demandant has sued a writ of entry, to recover his seisin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is the tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kelleran in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence a contract in writing, under the demandant's hand, of the following tenor: (Here his honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he, by pleading the general issue, had admitted on record that he was the tenant of the freehold. He was, therefore, estopped from proving that he had not the freehold but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeasance at common law of the conveyance made by Manly to the demandant, the tenant might have read it in evidence to show that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged, and if we had all the equity powers of a Court of Chancery, I should be satisfied that the conveyance in this case, with the written contract of defeasance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

Manly? if not
putting in issue
def't's being in fact
claiming a freehold
1. 2. if a legal
writ

Generally writ of entry would ^{not} lie vs a deft claiming less than a freehold unless he had ousted the p[er]p. 7 Pl. & Pr. 725. If deft wished to rely on his having less than freehold, he pleaded nontenure of freehold. The gen[er]al issue was nul disseisin which was what deft pleaded here. This ad-mits deft's tenure of freehold & puts p[er]p's title in issue. 7 Pl. & Pr. 727.

very interesting, in that it put rule on the ground of fraud. Certainly not fraud in sense of an intentional misrepresentation of fact. Real ground seems to be a presumed extortion. Note is interesting as noticing that instead of usual remedies by rescission the Ct molds the transaction into a mortgage.

If the agreement to permit redemption was after assignment as stated 179 ← then. Case wrong. The abs. assignment had passed whole title. Later agreement to give it to redeem had been void by Rt. Exrs. Ct said admissions in answer sufficient — seems not true unless on them Ct found as a fact that really intended as a mortgage at the time.

But the equity powers of this Court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeasance. (*Vide* Statutes 1785, c. 22;¹ 1798, c. 77.) Now a defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and is to be considered as part of it; so that the conveyance and defeasance must be taken together and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed. In this case the conveyance by Manly to Kelleran was by deed, and the agreement by Kelleran was merely by a simple contract; and, however it might in equity have the effect of a defeasance, at law it is not a defeasance of the deed of Kelleran.

The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. The written contract to Kelleran not under his seal was, in our opinion, properly rejected as evidence.

*as if defeasance
need not be
deed.*

Judgment according to the verdict.

Over.

STRONG v. STEWART.

COURT OF CHANCERY OF NEW YORK, 1819.

(4 Johns. Ch. 167.)

Bill to redeem mortgaged premises. The defendant set up an absolute sale, by an assignment, absolute in terms, of the right of Mitchell in the land, and denied the fact of a loan. But the defendant, at the same time, admitted in his answer, that after the assignment was executed he gave Mitchell, at his request, time to return the money, and take back the assignment.

Parol proof was taken, which established conclusively the fact

¹ *An Act giving Remedies in Equity*, Perpetual Laws of Mass., p. 138. Compare Mass. Stat. 1855, c. 194, § 1; Gen. Stats., c. 113, § 2, and see page 196, post. *The 1855 Act gave it full eq. force over*
rights.

of a loan, and not a purchase and sale; and that the assignment was made, given and received, by way of security for a loan.

THE CHANCELLOR [KENT]. On the strength of the authorities, and on the proof of the loan, and of the fraud, on the part of the defendant, in attempting to convert a mortgage into an absolute sale, I shall decree an existing right in the plaintiffs to redeem. The cases of *Cotterell v. Purchase*, Cases temp. Talbot, 61; *Maxwell v. Mountacute*, Prec. in Chancery, 526; *Washburn v. Merrills*, 1 Day's Cases in Error, 139, and the acknowledged doctrine, in 2 Atk. 99, 258, 3 Atk. 389, and 1 Powell on Mortg. 104 (4th London edit.) are sufficient to show, that parol evidence is admissible in such cases, to prove that a mortgage was intended, and not an absolute sale, and that the party had fraudulently perverted the loan into a sale. In this case, the admissions in the answer were sufficient to presume a mortgage, against the absolute terms of the assignment.¹

Prof. town claimed that pauper was a resident of deft. Decree accordingly.

? was whether pauper had gotten a residence in deft town by owning land there. She had
TOWN OF READING v. WESTON. *Received gen*

SUPREME COURT OF ERRORS OF CONNECTICUT, 1830. *also. deed*

(8 Conn. 117.) *which parol ev should be a mtge. Held in*

This was an action of assumpsit for the support of the wife and minor children of Samuel Darling.

The cause was tried (after two former trials),² at Fairfield, December term, 1829, before Williams, J.

The paupers derived their settlement from Lucy Darling, the mother of Samuel Darling. She was once an inhabitant of the town of Weston. The defendants claimed, that in March, 1808, she became the owner of a piece of land in the town of Reading, of the value of 800 dollars, by virtue of a deed from one Joseph

¹ "Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be made by admitting a verbal defeasance to be proved."—Per Peters, J., in *Stinchfield v. Milliken*, 71 Me. 567 (1880).

² See 7 Conn. Rep. 143, 409.—Rep.

a Ct of law ev is not a decis. Eg. will admit it & de-class deed mtge. J. for deft.

What might of authority with the case. Can-
not at law reduce ab. Conveyance to mtge.

Could the ptef here get relief in equity? Shd
depend on whether settlement depends on par-
ty having legal or equit. interest. If a man
legal interest will give a settlement w.o.
any beneficial int. then of course our
case settled matter. At law pauper was
full owner & got settlement. But if depends
on real ownership then pauper had no
settlement in ptef town & ptef town shd
recover. Seems then shd be allowed to
sue in equity where ~~so to pass it~~
proof of its case is possible.

Our case indicates that mtgee's int is
not suff. to give him a settlement. A
mtgor's int. is suff. if he is in pos. Here
both in pos. Probably since in equity
a mtge is a mere lien & not an estate
a mtgee's int. is not suff. to give a
settlement. If so seems bill in equity
ought to lie in our case. But a
cestui's right if cestui in pos. gives
a settlement - seems mtgee's right
is a benef. int. in property.

Burr. This deed was, on the face of it, an absolute deed, in the usual form, containing the usual covenants. A writing (recited at length, 7 Conn. Rep. 144) was made and signed by her, and delivered to Burr, simultaneously with the delivery of the deed, binding herself, if Burr should within three years bring her the 800 dollars, with interest, to deliver up to him such deed, but if he should fail to bring the money by the time limited, he should forfeit all claim to such deed. The defendants claimed that immediately after the execution of the deed, Lucy Darling, the grantee, went into possession of the land thereby conveyed, and possessed it in her own right in fee until the year 1813. It was admitted that she occupied part of the house and garden, belonging to the premises; and that Burr occupied the remaining part, during the period specified. Evidence was introduced as to the character of their respective possessions, or the right in which they occupied the premises; the plaintiffs claiming that Lucy Darling occupied as mortgagee under Burr and not in her own right. In support of this claim the plaintiffs introduced proof of her declaration that she had only a mortgage of the premises, and other parol evidence to shew that the deed and writing were given only to secure a sum of money, which Burr at that time borrowed of her, and for which he gave her his notes. This evidence was objected to by the defendants, but was received subject to the opinion of the court. And the court charged the jury that such evidence was proper to shew the nature, character and extent of her occupation; but that in this suit parol evidence could not be admitted to alter, enlarge or explain the deed or condition, or to shew that this conveyance was a mortgage.

The jury returned a verdict for the defendants; and the plaintiffs moved for a new trial, for a misdirection.

HOSMER, Ch. J. The only question in the case is, whether the parol evidence offered by the plaintiff, to control or vary the absolute deed, was admissible.

On a former occasion between the present parties, it was decided by this Court that the writing in question was only a contract, on certain terms, to re-convey the land; and that it did not render the deed a mortgage (*Reading v. Weston*, 7 Conn. Rep. 143). In the case before us, the parol evidence adduced by the plaintiffs to prove an absolute deed to be a deed on condition, was entirely inadmissible. No case determined in a court of law proving its admissibility, has been cited; nor am I aware that any such case exists. On the contrary, in *Flint v. Sheldon*, 13 Mass. Rep. 443, it was adjudged that an absolute deed of land cannot be varied by parol evidence shewing that it was for the loan and re-payment of a sum of money. This determination is directly in point for the defend-

ants. It has been so frequently adjudged by the courts on both sides of the Atlantic, as to have the resistless force of a maxim, that parol evidence cannot be received, in a court of law, to contradict, vary, or materially affect, by way of explanation, a written contract (*Skinner & al. v. Hendrick*, 1 Root, 253; *Stackpole v. Arnold*, 11 Mass. Rep. 27; *Jackson d. Van Vechten & al. v. Sill & al.*, 11 Johns. Rep. 201; 3 Stark. Ev. 1002; 1 Phill. Ev. 423, 441). It is not in opposition to this legal truth, that extrinsic parol evidence, when requisite, is admissible to apply the terms of a written instrument to a particular subject matter, but in perfect consistency with it. This is not to vary or contradict, but to give its intended effect to the contract. 25

Undoubtedly there have been determinations, some of which have been cited, proving that a stranger is not estopped by a written agreement; but that he may adduce parol testimony to prevent a fraudulent operation of it upon his interests (*The King v. Scamonden*, 3 Term Rep. 474; *New Berlin v. Norwich*, 10 Johns. Rep. 229; 3 Stark. Ev. 1018, 1052). But this principle has no application to the present case. The plaintiffs have not suggested that there was any fraud contemplated and practised on them. The pretence would have been very strange unless it were followed up by explicit testimony to this effect. The inhabitancy of Lucy Darling, *prima facie*, with property sufficient to purchase a farm of the value of 800 dollars, was a benefit to the plaintiffs, and not a prejudice; and all our towns would be pleased in this manner to extend their population. 26

It will be observed that the question before us is not what a court of chancery may do, in the exercise of its peculiar jurisdiction, but what is the established rule of a court of law. It has been often decided in chancery that parol evidence is admissible to shew that an absolute deed was intended as a mortgage, and that a defeasance was omitted through fraud or mistake. Hence, a deed absolute on the face of it, and though registered as a deed, will in chancery be held valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, although the defeasance was by an agreement resting in parol (*Washburn v. Merrills*, 1 Day, 139, 1 Pow. Mort. 200; *Strong & al. v. Stewart*, 4 Johns. Chan. Rep. 167; *James v. Johnson & al.*, 6 Johns. Chan. Rep. 417; *Maxwell v. Lady Mountacute*, Prec. in Chan. 526; *Dixon v. Parker*, 2 Ves. 225; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Clark v. Henry*, 2 Cowen, 324; *Slee v. Manhattan Company*, 1 Paige, 48). But these decisions are altogether in support of the determination of the judge in this case. Chancery interposes because a court of law does not afford a remedy. The rule in the courts of law is that the written instrument, in

merely comes to give weight of authority & wrong.

But under Codes the distinction is less important, tho' ?'s as to jury trial yet may arise.

contemplation of law, contains the true agreement of the parties, and that the writing furnishes better evidence of their intention than any that can be supplied by parol. But in equity, relief may be had against any deed or contract in writing founded in mistake or fraud (1 Madd. Chan. 41; *Moses v. Murgatroyd*, 1 Johns. Chan. Rep. 128; *Marks & al. v. Pell*, 1 Johns. Chan. Rep. 594; *Gillespie & ux. v. Moon*, 2 Johns. Chan. Rep. 585; *Noble v. Comstock*, 3 Conn. Rep. 295).

On the whole, it is incontrovertibly clear that the decision complained of is correct, and that a new trial must be denied.

Peters, Williams and Bissell, JJ., were of the same opinion.

Daggett, J., having been of counsel in the cause, gave no opinion.

New trial not to be granted.¹

SWART v. SERVICE.

SUPREME COURT OF NEW YORK, 1839.

(21 Wend. 36.)

This was an action of ejectment, tried at the Saratoga circuit in May, 1837, before the Hon. John Willard, one of the circuit judges.

The plaintiffs, the children of James Swart, deceased, who was the only child and heir at law of Derick Swart, showed title by lease and release, bearing date 24th and 25th September, 1784, executed by John Cuerdon to Derick Swart, conveying 68 acres of land, the premises in question: which instruments of lease and release were duly acknowledged by Cuerdon on the sixth day of April, 1804. Cuerdon, the releasor of the premises, died in possession of the premises eight or nine years before the trial, having occupied them since the date of the lease and release. The defendant was in possession of the premises at the commencement of the suit. He offered to prove that the lease and release was in fact given as a mortgage for the security of a debt due from Cuerdon to Swart, and that the debt was paid by Cuerdon to Swart many years before his death: this evidence was objected to, unless the defendant would connect himself with Cuerdon, and the objection was sustained by the circuit judge. The defendant then requested the judge to charge that the evidence established an adverse possession in Cuerdon. The judge refused so to charge, and directed a verdict for the plaintiffs, and the jury found accordingly. The defendant now

¹ *McClane v. White*, 5 Minn. 178 (1861); *Gates v. Sutherland*, 76 Mich. 231 (1889), accord. on genl pt that w. not adverse at law. Both under cases of eject.

*In up. both Eq & Law Courts
admit ev to show deed
a judge. Ejectment.
SUPREME COURT OF NEW YORK, 1839. diff. deny pt of title
& show that ab. died (lease
& release) to pt has a utge
has been
hd. Held
admis. How
been decided
that admis.
at law as
well as in
Equity.*

moved for a new trial on the two grounds raised at the circuit, and on the additional ground, that from lapse of time, *payment* of the mortgage might be presumed. . . .

M. T. Reynolds for the defendant.

S. Stevens, for the plaintiffs, insisted that a grantor cannot set up adverse possession against his grantee; and that it is not admissible at law to give parol evidence, showing that a deed is in fact a mortgage, unless fraud or mistake be shown.

By the Court: COWEN, J. The first offer made by the defendant had no dependence on privity of title between him and Cuerdon. It was a simple offer to prove an outstanding title, by turning the conveyance by lease and release into a mortgage, and shewing its extinction by payment. That would divest the title of Swart and of his grandchildren, the plaintiffs; for payment extinguishes a mortgage at law as well as in equity (*Jackson, ex dem. Rosevelt, v. Stackhouse*, 1 Cowen, 122). But independent of that, if Swart were a mere mortgagee, neither he nor those claiming under him could recover (2 R. S. 237, § 37, 2d ed., *Jackson, ex dem. Titus, v. Myers*, 11 Wendell, 533, 538, 539; *Stewart v. Hutchins*, 13 Wendell, 485; *Morris v. Mowatt*, 2 Paige, 586).

It has often been held in the courts of equity of this State, that a deed, though absolute on its face, may, by parol evidence, be shown to have been in fact a mortgage, in the terms offered here; and the same doctrine was held by this court in *Roach v. Cosine*, 8 Wendell, 227, and *Walton v. Cronley's Adm'r*, 14 id. 63, equally applicable to a court of law, and has it seems ceased to be the subject of contest; for no objection to the doctrine is now made. For one, I was always at a loss to see on what principle the doctrine could be rested, either at law or in equity, unless fraud or mistake were shown in obtaining an absolute deed where it should have been a mortgage. In either case, the deed might be rectified in equity; and perhaps even at law, in this State, where mortgages stand much on the same footing in both courts. Short of that, the evidence is a direct contradiction of the deed; and I am not aware that it has ever been allowed in any other courts of equity or law. But with us the doctrine is settled, and I am not disposed to examine its foundations, at least, without the advantage of discussion.

It is not necessary to say whether the lapse of time might be called in as presumptive proof of payment, though that, as a general doctrine, is too clear to be disputed. If the defendant, on a new trial, shall succeed in making out a mortgage, he will be entitled to such proofs of payment as the nature of his case may afford, subject to the answering proofs of the plaintiffs, provided proof of payment shall become necessary.

It will not, however, be necessary that we see, to complete his de-

assigning lease by ab. assignment intended as
utge. landlord seen assignee for rent. Held
can't recover as can be shown that assignee
was only utge. at law.

Clear case of title passing to deed &
allowed at law to be shown - utge.

Some
conclusion

fense here, whatever it may be on a bill filed to foreclose by the representatives of Derick Swart; for since the revised statutes, showing that the plaintiffs or those under whom they claim are mere mortgagees, proves as we have seen, an outstanding title.

There was no evidence of adverse possession in Cuerdon. I am of opinion that a new trial should be granted; the costs to abide the event.

THE CHIEF JUSTICE [NELSON] concurred.

MR. JUSTICE BRONSON delivered the following dissenting opinion:

Although I seldom allow myself to depart from the decisions of those who have gone before me in this court, I cannot agree with my brethren in following one or two recent cases which hold that an absolute deed can be turned into a mortgage in a court of law, by parol evidence. Where the transaction was intended as a mortgage, and through fraud or mistake the conveyance has been made absolute in its terms, a court of equity, acting upon well-established principles, can reform the deed. But this will only be done on a direct and appropriate proceeding for that purpose, and after such ample notice to all parties in interest, as will tend most effectually to guard against surprise, fraud and false swearing. And besides, a court of equity can and will protect third persons who may have parted with their money on the faith of the deed. But a court of law has neither power nor process to reform a deed. If parol evidence to contradict or insert a condition in the conveyance can be received at all, it must of necessity be in a collateral proceeding; and it must be received whenever either party chooses to offer it. It can be given without notice, and without the means of guarding against the obvious danger of fraud, surprise and perjury. And beyond this: when a court of law turns an absolute deed into a mortgage, it has no power to protect a *bona fide* purchaser. Other mischiefs will be likely to result from admitting such evidence; but without attempting at this time to point them out, I shall content myself with dissenting from what I deem a new and very dangerous doctrine.

omit.

*Read undelined. The written Ev.
Admiss. in E.g. to show deed wrong.*

HODGES v. THE TENNESSEE MARINE AND FIRE
INSURANCE CO.

COURT OF APPEALS OF NEW YORK, 1853.

(8 N. Y. 416.)

This was an action brought in the Superior Court of the city of New York upon a policy of insurance upon a hotel in Massachusetts, issued by the defendant to Joseph A. Slamm on the first of September, 1848. On the same day Slamm conveyed the premises to the plaintiff by a deed absolute on its face. On the 4th of the same month Slamm with the assent of the company assigned the policy to the plaintiff "as a collateral security." The property insured was burned in the month of April, 1849.

In the complaint the plaintiff alleged that Slamm had conveyed the insured premises to him by deed, "and that prior to and at the time of the conveyance the said Slamm had been and was legally indebted to him, and as a further security, simultaneously with the conveyance" assigned the policy to him as a collateral security. The defendant in the answer denied the plaintiff's right to recover, on the ground that the assignment was approved on the representation that it was intended as a collateral security upon an indebtedness secured by a mortgage, when in fact the insured premises had been conveyed absolutely to the plaintiff, by means whereof the policy became void. The plaintiff replied, denying that any representation that the indebtedness was secured by a mortgage was made, or that the approval of the defendant was made on the faith of such a representation, and averring that at the time of approving the assignment the defendant was informed of the deed.

On the trial the plaintiff, after giving in evidence the policy and assignment and proving the loss, rested. The defendant's counsel then moved for a nonsuit, which was denied. The deed from Slamm to the plaintiff was then given in evidence, and it was proved by witnesses in the defendant's office that at the time the approval of the assignment was made, it was understood to be collateral and to cover some mortgage, and that the blank for the assignment was there filled up at the request of the plaintiff. The defendant then rested. The plaintiff then called a witness to show that the deed was given merely as a security for money due to him from Slamm. The defendant's counsel objected, on the ground that the plaintiff's pleadings alleged the deed to be an absolute conveyance, and the court sustained the objection. The plaintiff's counsel then moved to amend the complaint by adding an averment that the con-

veyance of the insured premises was made as a collateral security for an indebtedness of Slamm to the plaintiff. The defendant opposed the amendment, on the ground that proof of such proposed allegation was inadmissible, as it went to contradict or vary the deed, and also that it was not allowable under the code of procedure, as it went to make out a new case, and to remedy a failure of proof. The court overruled the objections and allowed the amendment on condition that it be deemed traversed by the answer.

The plaintiff then proved by parol that the deed was given as a collateral security for money owing to him by Slamm, and also to cover expected advances. The parties then rested.

The defendant's counsel then submitted that the testimony showed an absolute title in the plaintiff under the deed: that if as between the immediate parties to it it might be construed as a mortgage, yet as to the defendant it was what it purported to be, an absolute deed. The court overruled the objection and directed a verdict for the plaintiff. The judgment rendered upon the verdict was affirmed by the court *en banc*, and the defendant appealed.

JOHNSON, J. The determination of the judge in allowing the amendment of the pleadings was within his discretionary power, and is not the subject of review, in this Court. C. 92

The remaining question in the cause relates to the existence of an insurable interest in Slamm at the time of the assignment of the policy to Hodges and of the loss. If such an interest existed, then the plaintiff's recovery cannot be disturbed.

Upon the evidence there is no doubt of the following facts: That at the time when the insurance was effected, September 1, 1848, Slamm was the owner in fee of the premises insured; that on the 4th of September, 1848, he conveyed the premises to Hodges by a deed absolute upon its face, but intended to operate as a mortgage, and that upon the same day he transferred the policy to Hodges as collateral security, and that this transfer was made by the assent of the company.

If there is no rule of law forbidding us to take notice of the fact that the deed was intended as a mortgage, then beyond all question Slamm as the owner of the equity of redemption in the premises had an interest in the insurance which had been effected by him as the owner of the fee, and the assignment with the company's assent transferred this interest to Hodges as collateral security, and he may upon the ground of the same interest sustain the recovery which has been had in this case.

The question then, taking it most strongly against the plaintiff, is, whether in equity Slamm might have a bill to redeem against Hodges, notwithstanding the deed was absolute upon its face. *Webb v. Rice*, 6 Hill, 219, does not conflict with the proposition that

such a bill might be maintained. It only professes to decide that at law unwritten evidence is inadmissible to show that a deed was intended as a mortgage. From an early day in this State the admissibility of such evidence had been established as the law of our Courts of Equity, and it is not fitting that the question should now be re-examined. Upon the authority of *Strong v. Stewart*, 4 J. C., 167; *Clark v. Henry*, 2 Cow. 332; *Whittick v. Kane*, 1 Paige, 206; *Van Buren v. Olmstead*, 5 Paige, 10; *McIntyre v. Humphreys*, 1 Hoff. 34, with which agree *Taylor v. Little*, 2 Sumner, 228; *Jenkins v. Eldredge*, 3 Story, 293, in all which cases, except *Clark v. Henry*, the point was directly before the Court, we think that the plaintiff's recovery in this case ought to be sustained.

Ruggles, Ch. J., and Gardiner, Jewett and Morse, JJ., concurred with Judge Johnson in favor of affirming the judgment.

Willard,¹ Taggart and Mason, JJ., were for its reversal.

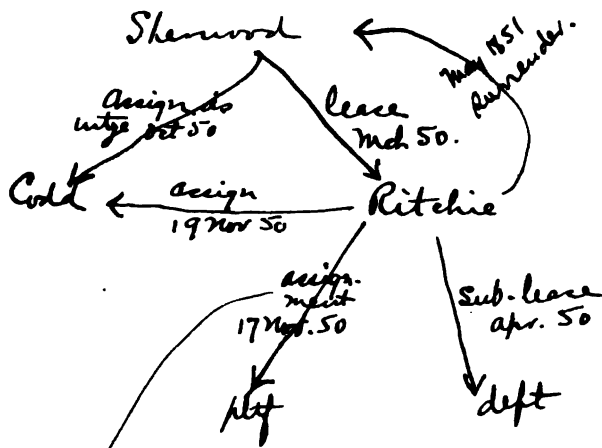
Judgment affirmed.

omit.
 ——— *Since Code C.P. is in admin.*
at law (in legal action) to
 DESPARD v. WALBRIDGE. *Show abs. Compliance*
 COURT OF APPEALS OF NEW YORK, 1857. *a judge.*
 (15 N. Y. 374.)

This action was brought to recover for the use and occupation of a store, in Buffalo, by the defendant, from May 1st, 1851, to August 1st, 1851, which the complaint averred to be worth \$375. It also averred that the defendant on May 1st, 1851, agreed to pay for such use and occupation \$1500 per annum, payable quarterly. The action was tried before a referee, who found the following facts: On the 8th of March, 1850, one Sherwood demised to H. B. Ritchie the store above mentioned, and another adjoining, for two years from the first of May then next, with a right of renewal on certain conditions, Ritchie covenanting to pay a certain rent. On the 17th of November, 1850, Ritchie assigned this lease and his title to the term thereby granted to the plaintiff. At the time of such assignment the defendant was in possession of the premises as a subtenant of Ritchie, under a lease executed April 30th, 1850, for the term of one year from May 1st, 1850.

Sherwood, the original lessor, on the 9th of October, 1850, assigned his interest in the lease executed by Ritchie to Robert Codd for the purpose of securing a debt which he owed to Codd. On the 19th of November, 1850, Ritchie assigned to Codd all his interest as landlord in the sub-lease executed between himself and the de-

¹ The dissenting opinion of Willard, J., is omitted.



def't offered to prove that this assignment was for benefit of Cordell & as a further security to him & that he is fully p'd. If that true pl'tf has no sto & real right are in Howard who now has Shermwood's int & also Rit. chie's. Held ex. admeis as establishes an Equit defense to pl'tf action & that good under Code.

Case clearly O.K. now that law & Eq. are merged.

fendant. The defendant occupied the premises under the lease from Ritchie, and after the assignment thereof to Codd paid the rent to the latter. On the 1st day of May, 1851, the plaintiff served on the defendant a written notice that he was the assignee of Ritchie's term, and that in case the defendant held over beyond his term, then at the point of expiring, the plaintiff would consider the premises as held and taken by defendant for the term of one year from May 1st, 1851, at the annual rent of \$1500, payable quarterly.

The plaintiff, having proved these facts, rested his case, and the defendant moved for a non-suit, which being refused by the referee, he took an exception. Other exceptions were taken upon the trial, and to the referee's report, which, with the facts relating thereto, sufficiently appear in the opinion of the court. The referee reported that the defendant occupied under an implied agreement to pay what the occupation of the premises was reasonably worth, which he found to be at the rate of \$1200 per annum. Judgment was entered upon his report, which was affirmed by the Supreme Court at general term, and the defendant appealed.

SELDEN, J.¹ . . . The principal question is that which arises upon the exception stated in the referee's report. It is set forth in the answer, in substance, that the assignment of the Sherwood lease from Ritchie to the plaintiff was made at the request and for the benefit of Codd, and for the sole purpose of aiding the latter in the collection of his debt against Sherwood. It is also stated that this debt had been fully paid before May 1st, 1851, by Hiram E. Howard, who had succeeded to the rights of Sherwood in the premises, and that Ritchie, on the 1st of May, 1851, surrendered all his rights in the premises to Howard, whose tenant the defendant then became. These facts the defendant offered to prove and his offer was rejected. . . .

But it is urged that the proof offered was properly excluded for another reason. The assignment to the plaintiff being absolute in its terms, it is said that parol evidence was inadmissible to show that it was intended as security merely; and the case of *Webb v. Rice*, 6 Hill, 219, is cited in support of this position. It was held in that case that in an action at law parol evidence could not be received to show that a deed, absolute upon its face, was intended as a mortgage. It was conceded, however, that the rule was settled otherwise in equity. In the case of *Hodges v. The Tennessee Insurance Company*, 4 Seld. 416, this court held that the rule in equity continued the same since the case of *Webb v. Rice* as before. The only question, therefore, upon this subject is whether the equity rule is applicable to the present case, which is a purely legal action.

¹ Portions of the opinion, dealing with foreign questions, are omitted.

As, however, since the enactment of the Code of Procedure a defendant may avail himself of an equitable as well as a legal defense in all cases, whatever may be the nature of the action, there would seem to be but little room for doubt upon the point (*Dobson v. Pierce*, 2 Kern, 156; *Crary v. Goodman*, *id.* 266; Code, § 150, subd. 2). That a deed absolute on its face was intended as a mortgage, would, before the Code, have been an equitable defense, because it could not have been proved at law. In order that it should now be made available in legal actions, as provided by the Code, the evidence to establish it must be admitted in that class of actions.

It may still be said that, admitting it to be shown that the assignment to the plaintiff was merely collateral to the debt of Sherwood to Codd, and that this debt had been fully paid prior to May 1st, 1851, yet so long as the lease was not reassigned, the legal title remained in the plaintiff, and that Ritchie could not surrender the lease while this title remained outstanding. The answer to this is, that if the assignment was collateral, it is the same as if the condition had been incorporated in the assignment itself, that upon payment of the debt the rights of the assignee should cease; and in such a case it is clear that no formal reassignment would be necessary. Whatever might be the effect of such an assignment in the hands of a subsequent *bona fide* assignee, it cannot be set up by the original assignee as evidence of a subsisting title in him, after full performance of the conditions upon which it was made.

There is still another question of fact which arose at the trial, but which was not passed upon by the referee, viz., whether the assignment to the plaintiff was intended as a security not only for the debt of Sherwood to Codd, but for that of Ritchie also. Should it turn out upon the new trial that the lease was assigned as security for both debts, and either remained unpaid on the 1st of May, 1851, then the case on the part of the plaintiff would be made out.

The judgment must be reversed and a new trial must be ordered, with costs to abide the event.

All the judges who had heard the argument concurring in this opinion,
New trial ordered.¹

¹ That such evidence is admissible at law, see *Jackson v. Lodge*, 36 Cal. 28 (1868), elaborately reviewing the authorities; *McAnnulty v. Seick*, 59 Ia. 586 (1882); Calif. Civ. Code, 1885, § 2925; No. Dak. Civ. Code, 1895, § 4703.

As to the weight of evidence required to prove an absolute deed a mortgage, see *Wilson v. Parshall*, 129 N. Y. 223 (1891).

(Calif. case relies on N.Y. cases) & on point that law req. negated.

Probs nothing more than rule that such party has to prove.

C.R.

Ex. Off.
payment
alone Ex-
tinguishes.

... says H.T. do not apply but doesn't give any satisfactory reason. says Ev. only defeats the conveyance. But that not at all true in Mass. The conveyance stands. The evidence goes to a Contract to convey on payment or to a condition subsequent.

In lieu states the Ev. does defeat the conveyance ~~but then it meets the~~ and cut it down. But it is not a case of reformation since parties intentionally choose abs. deed. Cannot reform deed \therefore If it is set aside then no writing creating lien.

Cannot make rule go along with gen'l principles. It is a separate head of Equity.

Most courts now say is separate head of equity but that grew out of accident, fraud, mistake, or like.

Of note: p. 177.

But Hestab. is on one claiming an absolute deed to be a utge.

Plff wished to complete a purchase of land. Deft lent him the money. Deft was made to plff. At deft request plff then also deeded land to
 CAMPBELL v. DEARBORN. *deft a security.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1872.

(109 Mass. 130.)

Bill in equity,¹ filed July 12, 1869, to compel a reconveyance of land by the defendant to the plaintiff, on the ground that the plaintiff's conveyance of it to the defendant, although in form absolute, was in substance a mortgage.

The bill alleged that the plaintiff on June 11, 1866, agreed with Artemas Tirrill for the purchase by him from said Tirrill of a parcel of land in Charlestown, and at the same time Tirrill gave him a bond to convey the land at any time within three years from said June 11, upon the payment to him of \$5500, the plaintiff to pay all assessments upon the land meanwhile; that since taking the bond the plaintiff has occupied the land; that in the early part of June, 1869, he made arrangements to borrow the sum of \$5500 from Charles J. Walker, in order to tender the same to Tirrill, and secure performance of his obligation to convey, within the time fixed in the bond; that on June 11, 1869, being disappointed in finding Walker, he met the defendant; that the defendant expressed regret that the plaintiff should be obliged to lose fulfilment of the bond through not having in time the money required, and voluntarily offered to lend to the plaintiff the required amount, and the plaintiff accepted the offer as an act of friendship, as he supposed; that the defendant and the plaintiff went immediately to Tirrill and tendered to him said sum of \$5500, and Tirrill thereupon delivered to the plaintiff his deed of the land in fee simple, in compliance with the bond, which deed was dated May 21, and was acknowledged before the defendant as a justice of the peace on said June 11, 1869; that upon leaving Tirrill the defendant said to the plaintiff that he ought to be secured for his loan in some way, and proposed that they should go to the defendant's attorney, to have the necessary papers prepared; that they thereupon went to the attorney's office, where the defendant and the attorney consulted together privately, and, without consulting the plaintiff, an instrument was drawn, and handed to him to sign, which upon reading he found to be drawn to convey the land in fee simple to the defendant; that the plaintiff objected to this form of conveyance, and desired to have a mortgage drawn instead, but was assured by both the attorney and the defendant that the instrument prepared would

*1855 has
 Eg. Juris
 of mortgages.
 No trust.
 No accident, fraud
 or mistake.
 It is not
 in way as
 object is to
 set deed
 aside not
 vary it.
 Reels anal.
 or me to
 that de-
 claring of
 parent sale
 with firm.
 to convey
 mortgages.*

¹ The statement of facts has been somewhat curtailed.

have the same effect; that, being ignorant of the legal effect of said instrument made under such circumstances, and relying on the statements of the attorney and the defendant, he on said June 11 executed and delivered said deed to the defendant; and that it was recorded in the registry of deeds at the same time with Tirrill's deed. . . .

The defendant, in his answer, denied that he ever made or offered to make any loan to the plaintiff; alleged that, on the contrary, he refused a request of the plaintiff for a loan; and further alleged that "the defendant agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name," and the plaintiff agreed that immediately on payment of the sum to Tirrill the land should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto;" that thereupon the defendant paid the \$5500 to Tirrill, and Tirrill executed and delivered to the plaintiff a deed of the land. . . .

WELLS, J. Regarding the money paid to Tirrill for the land as the money of the plaintiff, by loan from the defendant, there is still no resulting trust in favor of the plaintiff arising from the whole transaction. A deed was taken to the plaintiff, according to his equitable interest; and he thereupon conveyed to the defendant by his own deed. The recitals and covenants of that deed preclude him from setting up any trusts by implication, against its express terms (Blodgett v. Hildreth, 103 Mass. 484). His agreement with the defendant for a reconveyance cannot be enforced as a contract for an interest in lands (Gen. Sts., c. 105, § 1), nor will it create an express trust (Gen. Sts., c. 100, § 19). The question then is, Can the deed be converted into a mortgage, or impeached and set aside, or its operation restricted, upon any ground properly cognizable in a court of chancery?

This question was somewhat discussed, though not decided, in *Newton v. Fay*, 10 Allen, 505. Some suggestions were made as to the bearing of the statute of frauds upon it, in *Glass v. Hulbert*, 102 Mass. 24. For the reasons there suggested, we do not regard the statute of frauds as interposing any insuperable obstacle to the granting of relief in such a case; because relief, if granted, is attained by setting aside the deed; and parol evidence is availed of to establish the equitable grounds for impeaching that instrument, and not for the purpose of setting up some other or different contract to be substituted in its place. If proper grounds exist and are shown for defeating the deed, the equities between the parties will be adjusted according to the nature of the transaction and the facts and circumstances of the case; among which may be included the real agreement. It does not violate the statute of frauds, to admit

St. Ind.
- way.

W.

W. | parol evidence of the real agreement, as an element in the proof of fraud or other vice in the transaction, which is relied on to defeat the written instrument.

What will justify a court of chancery in setting aside a formal deed, and giving the grantor an opportunity to redeem the land, on the ground that it was conveyed only for security, although no defeasance was taken, is a question of great difficulty, and one upon which there exists a considerable diversity of adjudication, as well as of opinion. In Story Eq., § 1018, it is stated in general terms to be "fraud, accident and mistake." In 4 Kent Com., 6th ed., 142, 143, it is laid down that "parol evidence is admissible in equity, to show that an absolute deed was intended as a mortgage, and that the defeasance was omitted or destroyed by fraud, surprise or mistake." "It is determined, on the statute of frauds, that, if a mortgage is intended by an absolute conveyance in one deed and a defeasance making it redeemable in another, the first is executed, and the party goes away with the defeasance, that is not within the statute of frauds" (*Dixon v. Parker*, 2 Ves. Sen. 219, 225). Similar declarations are to be found in *Walker v. Walker*, 2 Atk. 98; *Joynes v. Statham*, 3 Atk. 388, and *Maxwell v. Mountacute*, Pre. Ch. 526; and adjudications in *Washburn v. Merrills*, 1 Day, 139; *Daniels v. Alvord*, 2 Root, 196, and *Brainerd v. Brainerd*, 15 Conn. 475; and see Story Eq., § 768.

This indeed is only one form of application of the general rule of equity, that one, who has induced another to act upon the supposition that a writing had been or would be given, shall not take advantage of that act, and escape responsibility himself, by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault. Besides the cases cited in *Glass v. Hulbert*, 102 Mass. 24, see *Bartlett v. Pickersgill*, 1 Eden, 515; s. c. 1 Cox Ch. 15; Browne on St. of Frauds, § 94. But this principle will not help the plaintiff here, because he does not allege that any defeasance was intended or expected; and it is found by the report that the deed "was executed by the plaintiff intelligently, and not by accident or mistake, and that no fraud was practised to procure its execution, other than may be inferred" from the facts stated.

From those facts, and from the bill and answer, we think these points must be taken to be established, to wit, 1st, that the plaintiff had purchased the parcel of land in controversy and held a contract from Tirrill for its conveyance to himself upon payment of the sum of \$5500; 2d. that the money was paid to Tirrill, and the land conveyed by Tirrill to the plaintiff, in fulfilment of that contract; 3d. that the money was advanced by the defendant to the plaintiff as a loan, and the deed from the plaintiff to the de-

fendant was given by way of security therefor. The report finds, "from all the circumstances surrounding the transaction, and from the acts and declarations of the parties at the time, that the plaintiff believed and had reason to believe" this to be the case.

The defendant, in his answer, does not pretend that he ever made any contract, either with Tirrill or the plaintiff, by which a price was agreed upon to be paid by him as and for the purchase of the premises for himself. His only allegation to this point is, at most, indirect and equivocal. He denies that said estate was purchased of Tirrill for the plaintiff's benefit, "neither did this defendant agree to purchase it for the benefit of the plaintiff, but for the use and benefit of the defendant." This is followed by an argumentative assertion of equitable title acquired as a resulting trust from payment of the purchase money, and that the deed from the plaintiff was given "for the purpose of vesting both the legal and equitable title in the defendant." He does allege that he "agreed to pay Tirrill the said sum of \$5500 for the premises described in the bill, provided the title to said premises should stand in the defendant's name." He alleges, with sufficient fulness and minuteness, that he refused to make a loan of the money to the plaintiff both "before and at the time of said payment to said Tirrill," and refused "to allow the plaintiff to have any interest in said money, or the premises purchased therewith," and that it was agreed that the premises should be conveyed in fee simple to the defendant, "and the plaintiff should not have any interest or title thereto." He further avers "that, before the plaintiff signed and executed his deed to this defendant, said deed was read in the presence and hearing of the plaintiff, and he was then and there informed that the same was an absolute conveyance, and that he ceased thereby to have any interest whatever therein." Taking the facts to be literally as thus alleged, they significantly suggest the inference that the money was advanced by the defendant for the accommodation of the plaintiff in his purchase of the land, and the deed given to the defendant for his security therefor; but that it was agreed between them that the plaintiff should retain no legal right of redemption. He was to trust himself wholly to the good faith and forbearance of the defendant.

It is alleged in the bill, and not denied in the answer, that the land has been all the time in the occupation of the plaintiff. We think it is also to be inferred that the land is of considerably greater value than the sum advanced by the defendant.

From the whole case we are satisfied that it was a transaction between borrower and lender, and not a real purchase of the land by the defendant. We are brought, then, to the question, Can equity relieve in such a case?

The decisions in the courts of the United States, and the opinions declared by its judges, are uniform in favor of the existence of the power, and the propriety of its exercise by a court of chancery (*Hughes v. Edwards*, 9 Wheat. 489; *Sprigg v. Bank of Mount Pleasant*, 14 Pet. 201, 208; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Taylor v. Luther*, 2 Sumner, 228; *Flagg v. Mann*, *ib.* 486; *Jenkins v. Eldredge*, 3 Story, 181; *Bentley v. Phelps*, 2 Woodb. & Min. 426; *Wyman v. Babcock*, 2 Curtis C. C. 386, 398; *s. c.* 19 How. 289). Although not bound by the authority of the courts of the United States, in a matter of this sort, still we deem it to be important that uniformity of interpretation and administration of both law and equity should prevail in the state and federal courts. We are disposed therefore to yield much deference to the decisions above referred to, and to follow them, unless we can see that they are not supported by sound principles of jurisprudence, or that they conflict with rules of law already settled by the decisions of our own courts.

We cannot concur in the doctrine advanced in some of the cases, that the subsequent attempt to retain the property, and refusal to permit it to be redeemed, constitute a fraud and breach of trust, which affords ground of jurisdiction and judicial interference.

There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit. In this aspect only can we regard it in the present case.

The decisions in the federal courts go to the full extent of affording relief, even in the absence of proof of express deceit or fraudulent purpose at the time of taking the deed, and although the instrument of defeasance "be omitted by design upon mutual confidence between the parties." In *Russell v. Southard*, 12 How. 139, 148, it is declared to be the doctrine of the court, "that, when it is alleged and proved that a loan on security was really intended, and the defendant sets up the loan as payment of purchase money, and the conveyance as a sale, both fraud and a vice in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." The conclusion of the court was, "that the transaction was in substance a loan of money upon security of the farm, and, being so, a court of equity is bound to look through the forms in which the contrivance of the lender has enveloped it, and declare the conveyance of the land to be a mortgage."

O.K.

no fraud
or any thing
nec.

Last section

This doctrine is analogous, if not identical with that which has so frequently been acted upon as to have become a general if not universal rule, in regard to conveyances of land where provision for reconveyance is made in the same or some contemporaneous instrument. In such cases, however carefully and explicitly the writings are made to set forth a sale with an agreement for repurchase, and to cut off and renounce all right of redemption or reconveyance otherwise, most courts have allowed parol evidence of the real nature of the transaction to be given, and, upon proof that the transaction was really and essentially upon the footing of a loan of money, or an advance for the accommodation of the grantor, have construed the instruments as constituting a mortgage; holding that any clause or stipulation therein, which purports to deprive the borrower of his equitable rights of redemption, is oppression, against the policy of the law, and to be set aside by the courts as void (4 Kent Com., 6th ed., 159; Cruise Dig., Greenl. ed., tit. xv., c. 1, § 21; 2 Washb. Real Prop., 3d ed., 42; Williams on Real Prop., 353; Story Eq., § 1019; Adams Eq., 112; 3 Lead Cas. in Eq., 3d Am. ed.; White & Tudor's notes to *Thornborough v. Baker*, pp. 605 [*874] & seq.; Hare & Wallace's notes to s. c. pp. 624 [*894] & seq.).

The rule has been frequently recognized in Massachusetts, where, until 1855, the courts have held their jurisdiction of foreclosure and redemption of mortgages to be limited to cases of a defeasance contained in the deed or some other instrument under seal (*Erskine v. Townsend*, 2 Mass. 493; *Kelleran v. Brown*, 4 Mass. 443; *Taylor v. Weld*, 5 Mass. 109; *Carey v. Rawson*, 8 Mass. 159; *Parks v. Hall*, 2 Pick. 206, 211; *Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Eaton v. Green*, 22 Pick. 526). The case of *Flagg v. Mann* is explicit, not only upon the authority of the court thus to deal with the written instruments of the parties, but also upon the point of the competency of parol testimony to establish the facts by which to control their operation; although, upon consideration of the parol testimony in that case, the court came to the conclusion that there was a sale in fact, and not a mere security for a loan.

By the St. of 1855, c. 194, § 1, jurisdiction was given to this court in equity "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages" (Gen. Sts. c. 113, § 2). The authority of the courts, under this clause, is ample. It is limited only by those considerations which guide courts of full chancery powers in the exercise of all those powers.

If then the advantage taken of the borrower by the lender, in requiring of him an agreement that he will forego all right of redemption in case of non-payment at the stipulated time, or an absolute

deed with a bond or certificate back, which falsely recites the character of the transaction, representing it to be a sale of the land with a privilege of repurchase, be a sufficient ground for interference in equity by restricting the operation of the deed, and converting the writings into a mortgage, contrary to the expressed agreement, it is difficult to see why the court may not and ought not to interpose to defeat the same wrong, when it attempts to reach its object by the simpler process of an absolute deed alone. In each case the relief is contrary to the terms of the written agreement. In one case it is against the express words of the instrument or clause relied on as a defeasance, on the ground that those words are falsely written as a cover for the wrong practised, or an evasion of the right of redemption. In the other it is without an instrument or clause of defeasance, on the ground that it was oppressive and wrongful to withhold or omit the formal defeasance. In strictness, there is no defeasance in either case. The wrong on the part of the lender or grantor, which gives the court its power over his deed, is the same in both. "For they who take a conveyance as a mortgage without any defeasance are guilty of a fraud" (*Cotterell v. Purchase*, Cas. temp. Talbot, 61). See also *Barnhart v. Green-shields*, 9 Moore P. C. 18; *Baker v. Wind*, 1 Ves. Sen. 160; *Mellor v. Lees*, 2 Atk. 494; *Williams v. Owen*, 5 Myl. & Cr. 303; *Lincoln v. Wright*, 4 De Gex & Jones, 16.

As a question of evidence, the principle is the same. In either case the parol evidence is admitted, not to vary, add to or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which affords ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether. This is a general principle of evidence, well established and recognized both at law and in equity (*Stackpole v. Arnold*, 11 Mass. 27; *Fletcher v. Willard*, 14 Pick. 464; 1 Greenl. Ev., § 284; *Perry on Trusts*, § 226).

The reasons for extending the doctrine, in equity, to absolute deeds, where there is no provision for reconveyance, are ably presented by Hare & Wallace in their notes to *Woollam v. Hearn*, 2 Lead Cas. in Eq., 3d Am. ed., 676, and to *Thornborough v. Baker*, 3 *ib.* 624. See also *Adams Eq.*, 111; 1 Sugd. Vend., 8th Am. ed., Perkins notes, pp. 267, 268, 302, 303. The doctrine thus extended is declared, in numerous decisions, to prevail in New York; also in Vermont and several other States. Mr. Washburn, in his chapter on Mortgages, § 1, has exhibited the law as held in the different States, in this particular; and the numerous references there made, as well as by the annotators in the other treatises which we have cited, render it superfluous to repeat them here (2 Washb. Real Prop., 3d ed., 35 & seq.). Upon the whole, we are convinced

that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt.

It is not enough that the relation of borrower and lender, or debtor and creditor, existed at the time the transaction was entered upon. Negotiations, begun with a view to a loan or security for a debt, may fairly terminate in a sale of the property originally proposed for security. And if, without fraud, oppression, or unfair advantage taken, a sale is the real result, and not a form adopted as a cover or pretext, it should be sustained by the court. It is to the determination of this question that the parol evidence is mainly directed.

The chief inquiry is, in most cases, whether a debt was created by the transaction, or an existing debt, which formed or entered into the consideration, continued and kept alive afterwards. "If the purchaser, instead of taking the risk of the subject of the contract on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mortgage security" (1 Sugd. Vend., 8th Am. ed., 302, in support of which the citations by Mr. Perkins are numerous). But any recognition of the debt as still subsisting, if clearly established, is equally efficacious; as the receipt or demand of interest or part payment (*Eaton v. Green*, 22 Pick. 526, 530).

o.k. Although proof of the existence and continuance of the debt, for which the conveyance was made, if not decisive of the character of the transaction as a mortgage, is most influential to that effect; yet the absence of such proof is far from being conclusive to the contrary (*Rice v. Rice*, 4 Pick. 349; *Flagg v. Mann*, 14 Pick. 467, 478; *Russell v. Southard*, 12 How. 139; *Brown v. Dewey*, 1 Sandf. Ch. 56). When it is considered that the inquiry itself is supposed to be made necessary by the adoption of forms and outward appearance differing from the reality, it is hardly reasonable that the absence of an actual debt, manifested by a written acknowledgment or an express promise to pay, should be regarded as of more significance than the absence of a formal defeasance. It of course compels the party attempting to impeach the deed to make out his proofs by other and less decisive means. But as an affirmative proposition it cannot have much force.

A mortgage may exist without any debt or other personal liability of the mortgagor. If there is a large margin between the debt or sum advanced and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of ←

a necessitous borrower or debtor. Hence inadequacy of price, in such case, becomes an important element in establishing the character of the transaction. Inadequacy of price, though not of itself alone sufficient ground to set in motion chancery powers of the court, may nevertheless properly be effective to quicken their exercise, where other sufficient ground exists (Story Eq., §§ 239, 245, 246); and in connection with other evidence may afford strong ground of inference that the transaction purporting to be a sale was not fairly and in reality so (Kerr on Fraud and Mistake, 186 and note; *Wharf v. Howell*, 5 Binn. 499).

Another circumstance, that may and ought to have much weight, is the continuance of the grantor in the use and occupation of the land as owner, after the apparent sale and conveyance (*Cotterell v. Purchase*, Cas. temp. Talbot, 61; *Lincoln v. Wright*, 4 De Gex & Jones, 16). These several considerations have more or less weight, according to the circumstances of each case (*Conway v. Alexander*, 7 Cranch, 218; *Bentley v. Phelps*, 2 Woodb. & Min. 426). It is not necessary that all should concur to the same result in any case. Each case must be determined upon its own special facts; but those should be of clear and decisive import.

In the present case, we are able to arrive at the clear and satisfactory conclusion that there was no real purchase of the land by the defendant, either from Tirrill or from the plaintiff; that his advance of the purchase money at the request of the plaintiff created a debt upon an implied assumpsit, if there was no express promise; and that it was the expectation of both parties that the money would be repaid soon and the land reconveyed. Whatever may have been the intention of the defendant, he must have known that this was the expectation of the plaintiff; and it is most favorable to him to suppose that it was his own expectation also. These conclusions are not in the least modified in his favor by an examination of his answer.

We must declare therefore that in equity he holds the title subject to redemption by the plaintiff in such manner and upon such terms as shall be determined upon a hearing therefor before a single justice.

*Decree accordingly.*¹

¹ See *Horn v. Keteltas*, 46 N. Y. 605 (1871).

The view that fraud, mistake or undue influence must be shown, once general, has been for the most part abandoned. See, for example, *Brainerd v. Brainerd*, 15 Conn. 575 (1843) and *French v. Burns*, 35 Conn. 359 (1868). It survives, however, in a few States (*Norris v. McLam*, 104 N. C. 159 [1889]; Ga. Code, 1895, § 2725; Miss. Ann. Code, § 4233), and its influence may be traced in many others (*Sutphen v. Cushman*, 35 Ill. 186 [1864]; *Stinchfield v. Milliken*, 71 Me. 567 [1880]; *Russell v. Southard*, 12 How. 139, 147-8 [1851]).

"It will be perceived that in none of these cases did the court attempt

N. H. GEN. LAWS, c. 136. § 1. Every conveyance of lands, made for the purpose of securing the payment of money, or the performance of any other thing in the condition thereof stated, is a mortgage within the meaning of this chapter.

§ 2. No conveyance in writing of any lands shall be defeated, nor any estate encumbered by any agreement, unless it is inserted in the condition of the conveyance and made part thereof, stating the sum of money to be secured or other thing to be performed.

*over the
rule.*

PENN. LAWS, 1881, No. 91. § 1. Be it enacted, &c., That no defeasance to any deed for real estate, regular and absolute upon its face, made after the passage of this act, shall have the effect of reducing it to a mortgage, unless the said defeasance is made at the time the deed is made and is in writing, signed, sealed, acknowledged and delivered by the grantee in the deed to the grantor, and is recorded in the office for the recording of deeds and mortgages in the county wherein the said lands are situated, within sixty days from the execution thereof; and such defeasances shall be recorded and indexed by the recorder.—Approved the 8th day of June, A. D. 1881.

*Adopted C. L.
as distinguishing
from E. rule*

to range the jurisdiction to turn an absolute deed into a mortgage, by parol evidence, under any specific head of equity, such as fraud, accident or mistake; but the rule seems to have grown into recognition as an independent head of equity. Still it must have its foundation in this, that where the transaction is shown to have been meant as a security for a loan, the deed will have the character of a mortgage, without other proof of fraud than is implied in showing that a conveyance, taken for the mutual benefit of both parties, has been appropriated solely to the use of the grantee. For when we seek in the standard authorities for the ground or principle upon which the doctrine of the admissibility of parol evidence originally rested, it will be found in the old and familiar heads of equity, such as fraud, accident, mistake or trust. Chancellor Kent, 4 Com. 143, states the doctrine thus: 'A deed, absolute on the face of it, and though registered as a deed, will be valid and effectual as a mortgage, as between the parties, if it was intended by them to be merely a security for a debt, and this would be the case, though the defeasance was by an agreement resting in parol, for parol evidence is admissible in equity to show that an absolute deed was intended as a mortgage, and that the defeasance has been omitted or destroyed by fraud, surprise, or mistake.' Story, speaking of the same subject, says: 'Even parol evidence is admissible in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, absolute on its face, was intended between the parties to be a mere mortgage or security for money' (2 Eq. Jur., § 1018, note 2).—Per McAllister, J., in *Ruckman v. Alwood*, 71 Ill. 155 (1873).

N.H. St. is stricter than the C.L. which permitted a separate defeasance.

Adopt C.L. rule as to what is good defeasance.

Apparently in gen'l are no statutes dealing with matter. Stearns, Am. St. Law, § 1856.

If pro. passes requires paid.

GA. CODE, 1895. § 2725. A deed or bill of sale, absolute on its face and accompanied with possession of the property, shall not be proved (at the instance of the parties) by parol evidence to be a mortgage only, unless fraud in its procurement is the issue to be tried.¹

*Requires
fraud.*

¹ Miss. Ann. Code, § 4233, is to the same effect.

CHAPTER III.

THE OBLIGATION SECURED.

SECTION I. IS AN OBLIGATION NECESSARY?

ACTON v. ACTON.

COURT OF CHANCERY, 1704.

(Finch, Pre. Ch. 237.)

*Bond which is claimed to
create a lien on land &c.
came void at law by
marriage but held lien
good anyhow.*

omit.

THE plaintiff's husband before marriage gives her a bond to leave her 1000*l.* if she survived him, and the same day marries her; and some years after dies intestate, leaving a freehold and copyhold estate all in mortgage.

The plaintiff takes out administration, but the personal estate not being near sufficient to satisfy the said bond, she brings her bill against the heir and mortgagee to redeem, and be let in to have satisfaction of the said bond.

The defendant, the heir, urged, that by the marriage the bond became void in law, and could not be maintained here, especially against him, who is chargeable only in such case by being specially named; and though it would be supported as a marriage agreement in writing, yet could only charge the personal estate; and that, however, it cannot affect the copyhold.

*heirs mentioned
apparently.*

On the other side it was said, this was once a good bond, and the heirs are bound in it; and though by the marriage it lost its force in point of law, yet in equity it will have the same force as before, and bind the husband, and entitle the plaintiff to a redemption; as if the obligee loses his bond, yet equity will set it up, and give him the same advantage of it, as if it were in being; and if equity does support it, it must support it, not only as an agreement in writing, but as a bond, and therefore the plaintiff ought to have the redemption as a bond creditor would have had; and though it was agreed, it would not entitle her to redeem the copyhold, if mortgaged by itself, yet when that and the freehold are mortgaged together, she must redeem the whole, and cannot redeem by parcels; and though

In *Aston v. Aston* was oblig. whole time as prob
even at C.L. contracts made before marriage
not to be performed until after disso-
lution of marriage are not affected by
the marriage. 15 A.R.E. Eng. 852.

Then again wife had no right except
so far as her right to be paid out of
land that descended to heir if heirs
mentioned & not even personally, is
a sort of lien on that land. But not
really ~~lien~~. If heir sells land bond-
holder's only right is to go after pro-
ceeds. Tiffany, Real Prop. §462, 574.

No? of whether an oblig. nec. in this case
as was an oblig. see 203 → See below.

Case seems O.K. in holding:

- (1) Not a voluntary executory agreement but a complete conveyance. Was also an a consid. - giving up Suit. (below) Whether utge Conveys legal title or only lies if is complete in either case. Equity is not being asked to effectuate an incomplete gift.
- (2) Statute as to trust did not make it bad. Utge not under statute. prob. ably(?) Could find no other dis. of pt. See Sto. like this in 1 Strinsan. St. L. §1703. And as Ct said if under and only cut out the trustee. Also perhaps good under exception permitting a trust to sell land & pay a charge thereon. Dis. of these Sto. in 28 A.R. Ency. 867.
- (3) Was there lack of oblig. here because H. & W. Could not contract with each other? At time of case H. & W. could not contract with each other at law. 71 N.Y. 199 in 1877 held ^{with only eqt. int. up to 1877} ~~that~~ ^{But in equity com.} ~~separate estate or as to his if~~ ^{separate estate or as to his if} ~~between H. & W. if reasonable & proper~~ ^{between H. & W. if reasonable & proper} were enforced. 117 N.Y. 411. And even at law contracts for separate maintenance of wife are valid if separation has taken place or takes place immediately. Bishop, Marriage, §1269, 1278. So here was a cont. betw H. & W. that was valid. But
- (4) Poo. under law of N.Y. as it then stood there was no oblig. to child to convey. She was a gift beneficiary. Case is before late N.Y. cases giving related gift beneficiaries rights. So here is a utge made to child (in effect) to get no oblig. to child. So after all case is perhaps

the heir on payment of what is due on the mortgage will have back the copyhold from us, yet we shall hold the freehold till satisfied the bond.

LORD KEEPER [WRIGHT] said, if the bond were executed (which being doubtful, was ordered to be tried) the court would support it as a bond; and that the freehold and copyhold being mortgaged together, the plaintiff should redeem both.¹

Suit by wife for sep. maintenance compromised by H. conveying land to trustee to secure perf. by him of understanding that he shd. deed house worth 10000\$ to infant daughter & give her 500\$ a year.

BUCKLIN v. BUCKLIN. COURT OF APPEALS OF NEW YORK, 1864.

(1 Abb. App. Cas. 242.)

Olive E. Bucklin brought this action in the Supreme Court against William and George R. Bucklin, to foreclose a mortgage made by their ancestor, William Bucklin, Sr.

William Bucklin, Sr., and his wife, Esther, previous to his executing this mortgage had separated, and she had filed a bill in chancery for a judicial separation (*a mensa et thoro*) on the ground of his cruel treatment of her. In the bill she prayed that he might be compelled to maintain her, and that the custody of their infant daughter, Olive E., might be awarded to her. Upon the bill she obtained an injunction restraining him from molesting the child.

In order to compromise the controversy and stay the prosecution of the suit, the husband, William Bucklin, Sr., agreed to make provision for the support of his wife and the infant, together, and separate from himself, and convey a house and lot to the child within six months.

To effect this settlement the mortgage in suit was executed to Vedder Green (who appeared as the next friend of the wife in her divorce suit) and was expressed to be made to him in trust for the wife and infant daughter.

The mortgage, which was set forth in the complaint, recited the

¹ "As to the objection that here was no covenant for the payment of the principal or interest, he said that was not material; the same not being necessary for the making of a mortgage, nor yet necessary that the right should be mutual—viz., for the mortgagee to compel the payment as well as for the mortgagor to compel a redemption; since such conveyance as in the present case, though without any covenant or bond for the payment of the money, would yet be plainly a mortgage."—Sir Joseph Jekyll, *arguendo*, in *Floyer v. Lavington*, 1 P. Wms. 268 (1714). And see Lit., § 338, and Co. Lit., 209, a, b, p. 11, *supra*.

A trust to satisfy a charge created at time of trust is good under allowing trusts to pay charges on property.

foreclosed. Not in valid as a mortgage. Cause wife conveyance. Gift in excess. St. for bidding husband in land except for specified purposes, does not apply to wife, as they only create a pledge of land. A mortgage may create an obligation created by contract in. Should be valid.

Onit.

→

above facts, and after providing for the said support of the wife and daughter, and the suspension of proceedings in the suit, without modification or discontinuance, the mortgage contained the following language: "Now, for the purpose of securing the performance by the said William, of the aforesaid agreements and covenants on his part to be performed, this indenture witnesseth—that the said William Bucklin, in consideration of the premises, and also on consideration of the sum of one dollar, paid to the said William by the said Vedder Green, the receipt of which sum is hereby confessed and acknowledged, hath granted, bargained, sold," &c., "and doth grant," &c., to Vedder Green and his heirs and assigns forever (here was inserted the description of the lands; habendum to him, his heirs, and assigns, forever), "provided, that if the said William Bucklin shall within the period of six months convey to Olive Esther Bucklin real estate of the value of one thousand dollars, to consist of a dwelling," &c., and if he shall permit Esther to occupy the same without molestation, and if he shall pay to Esther Bucklin three hundred dollars annually during their joint lives, and shall permit the said Esther Bucklin to have the custody, management, &c., of said Olive Esther Bucklin, without any interference on his part (and if he should also perform certain other conditions relating to personal property), then this indenture shall be void. And it is hereby declared that this mortgage is given to Vedder Green in trust for the benefit of Esther Bucklin and her infant daughter, Olive Esther Bucklin. And in case the above conditions on the part of said William, or any of them, shall be broken, and it shall at any time hereafter be necessary to enforce this mortgage, the amount that shall be recovered on said mortgage shall be recovered for the benefit of the said Esther and her infant daughter or the survivor of them.

The complaint then averred that Bucklin, Sr. wholly failed to convey land and dwelling, &c., as he agreed (though payment of the annuity was admitted), and demanded judgment for the foreclosure of the mortgage for the sum of one thousand dollars, the value of the land and dwelling promised to be conveyed, and interest, &c.

When the mortgage was made, in 1836, the child (the present plaintiff) was about three years of age. The trustee, Vedder Green, died in 1841, the husband and wife died in 1843 and 1844. In 1857, the daughter, coming of age, procured an order of court appointing her to enforce the trust and bring an action in her own name.

The defendants were heirs of the mortgagor in possession.

The judge before whom the cause was tried sustained the mortgage; found that the husband and wife never afterward cohabited,

authority that personal oblig. is not nec. If

Consid. must ^{must} ~~must~~ ^{from} ~~from~~ ^{promises} ~~promises~~
+ if that child is ^{promised} ~~promised~~

Case is also authority that Consid. is not nec. A voluntary intge w.o. any

Consid. or personal liability is good.

(5) Note also pltf is suing to purchase asking Equity for aid. Will Eq. aid a volunteer? Up under next case.

But this is inconsistent with supposition just above that child is a gift beneficiary.

though for a short time they resided in the same house, and he gave judgment for plaintiff with interest from the date of the mortgage.

The Supreme Court, at General Term, affirmed this judgment, holding that this was an action on a sealed instrument, and, if the cause of action had accrued after the Code of Procedure went into effect, it would have been governed by section 90 of the Code, but that as it had accrued before that time, it was governed by 2 R. S., c. 8, tit. 3, art. 1, § 9, which enacts that the time which shall have elapsed between the death of any person, and the granting of letters testamentary or of administration on his estate, shall not be deemed any part of the time limited by any law, for the commencement of actions by executors or administrators. That had the trust descended to the personal representatives of the trustee, this cause of action would have been saved from the operation of the statute; and that the *cestui que trust* should not be prejudiced by having the trust fall on the court of chancery, as it did on the death of Green, but that an analogous rule should be applied, and the whole term of twenty-one years allowed in which to bring the action, which would prevent it from being barred.

From that judgment the defendants appealed to this court.

F. Kernan for defendants, appellants.

John H. Reynolds for plaintiff, respondent.

By the Court: DENIO, Ch. J. The mortgage, so far as it is now sought to be enforced, was created, among other objects, to secure the plaintiff, then an infant of tender age, a portion of her father's property, to aid in her maintenance during her infancy, and to furnish her with a small independent estate in real property. The differences which had arisen between her parents presented the occasion for this gift; but its validity did not depend upon the merits of that controversy, nor yet upon the legal effect of the agreement for a separation between her father and mother, nor upon the legality of the provisions made by the former for the latter. The contract, so far as it relates to that provision, has either been performed or it is now incapable of performance. The party entitled to its benefits has been long dead, and it does not appear that she left any representative capable of enforcing any of its stipulations which were not performed at her death. Moreover, this suit was not brought to recover such interest. But the plaintiff survives, and is entitled to the settlement attempted to be made in her favor, provided it was legally valid when made, and provided her rights have not been lost by lapse of time.¹

¹ The second portion of the opinion, dealing with the effect of the lapse of time, is omitted, the conclusion being reached that the Statute of Limitations was not a bar.

*Had a Lien
does not
apply as
time betw.
death of
trustee &
appointment of
new one (?) to
be counted
out by analogy
to a St. a. to
time betw.
death & afft.
ment of Admors.*

1. Where the rights of creditors do not stand in the way, and there appear not to have been any in this case, it is perfectly lawful for a parent to make such provision out of his estate for a child or children, by present, gift or by testament, as he may think proper. There are cases in which a voluntary executory gift will not be enforced by the courts; but an executed one is as valid as though based on a full pecuniary consideration.

A mortgage is an executed conditional transfer of the real estate mortgaged. In judgment of law, any conveyance which would be sufficient to pass the title to a purchaser conveys it to the mortgagee. The instrument executed by William Bucklin to Vedder Green would be a perfect deed of bargain and sale but for the condition by which it was to become void upon performance of the agreement. It expresses a pecuniary consideration which, though nominal, is as adequate to waive a use as though it were the full value of the land, and though it may not have been paid, the defendant is estopped by his deed from denying its payment. By the Revised Statutes it is denominated a grant; but for all substantial purposes it has the effect of a deed of bargain and sale (1 R. S., 738, 739, §§ 137, 138, 142). At common law, and before the jurisdiction of courts of equity to relieve against forfeitures had been established, this deed would have vested in the trustee an estate in fee simple defeasible only by the performance of the conditions. This is, of course, a technical view of the nature of a mortgage.

By applying to the transaction the equitable doctrines of the courts of equity, now also recognized to a great extent by the courts of law and by modern statutes, the mortgage is simply a security for the payment of the money it was given to secure, and the mortgagor continues to own the land, while the mortgagee's interest is that of a creditor only.

But the defendants' position is formal also. They insist that courts of equity will not decree the performance of a voluntary executory agreement even where the subject is a portion intended for a child or other relative, and authorities are referred to to sustain that position (*Duvoll v. Wilson*, 9 Barb. 487, and cases cited; but see *Souverye v. Arden*, 1 Johns., Ch. 240, 266, and cases referred to by Chancellor Kent). If the settlement be an executed one, like a deed or mortgage, the doctrine relied on has no application. The title of the mortgaged premises is transferred by legal conveyance. The mortgagor retains an equity of redemption, equivalent, for many purposes, to a general ownership of the land, but yet, in point of form, an equity. The mortgagor may, it is true, come into a court of equity to enforce his mortgage, as the mortgagee must in order to redeem. The reason why a mortgagee must resort to equity is not because the mortgage is an executory transaction, and

See 1st ed.?

Cont.

←

mortgagee
mortgagor

requires the aid of a court of chancery to compel a specific performance. On non-performance of the conditions the mortgage is forfeited at law, but the equity of redemption remains in the mortgagor or his representatives. No prospective language of the parties which can be written is strong enough to produce the forfeiture of that equity, which can only be extinguished by a decree, or an equivalent proceeding, under a positive statute. This rule is expressed by the phrase, "once a mortgage, always a mortgage." The mortgagee cannot destroy this equity except by a suit in chancery or a statute foreclosure. Formerly, he could bring ejectment to get possession of the estate, after forfeiture at law, but that is now forbidden by statute. Still if he can be got into possession without a breach of the peace, his title under the mortgage deed is strong enough in law to enable him to defend an ejectment brought by the mortgagor (*Mickles v. Dillaye*, 17 N. Y. 80; *Mickles v. Townsend*, 18 *id.* 575). The plaintiff brings her suit in equity, not for the purpose of being aided in establishing her mortgage under the notion of remedying a defective conveyance, or obtaining a specific performance, but to foreclose and extinguish the defendants' equity of redemption, which a court of law is not competent to deal with. She does not come to establish a voluntary equitable agreement, but to enforce a legal title under an executed conveyance, and to cut off an equity attached to that legal title and vested in the defendants.

A point is made that the mortgage is invalid because made to Green as a trustee, he confessedly having no beneficial interest, and because the purposes of the trust are not such as are contemplated by the fifty-fifth section of the chapter of the Revised Statutes relating to uses and trusts. Now, although for the purpose of showing that a mortgage is an executed conveyance and not a mere executory agreement, I have recurred to the legal nature of that instrument as a conveyance of the land mortgaged, I am not prepared to concede that it should be regarded as "a disposition of the land by deed" within the meaning of the article of the Revised Statutes respecting uses and trusts (1 R. S., 727). The modern idea of a mortgage is a pledge of the land to secure the payment of money. The statute relates to interests in lands, properly so called, and not to collateral pledges made for the purpose of securing interests in personalty. Debts secured by mortgage are declared to be personal assets and go to the personal representatives (2 R. S., 82, § 6, subd. 8).

A trust of personalty is not within the statutes of uses and trusts, and may be created for any purpose not forbidden by law. This mortgage is not, therefore, at all within the influence of the fifty-fifth section, or within the one which abolishes uses and trusts. But

Very question all
If a trust this
is a trust of the
land not of
the debt as
Cured.

Since not held St. did not require consid.
for created cont., statement is true: Such
statutes have almost always been con-
sidered the other way,

O.K.

O.K.

if it were otherwise, and if the interest in the land conveyed by a mortgagor to a mortgagee were regarded as within the purview of that section, the only effect in this instance would be to annihilate the title and strike out the name of Green, the trustee, and to invest the beneficiaries with the title nominally conferred on Green. This effect is produced by section 49 of said article, which declares that if a disposition of land be made to one or more persons, to the use of or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee; and section 47, which confers upon the beneficiary in such cases an estate of the same quality as his beneficial interest. Again, a trust may, by section 55, also be created to sell lands for the purpose of satisfying any charge thereon. This does not require a pre-existing charge. One created at the same time and by the same instrument which contains the conveyance would be sufficient to bring the disposition within the terms and spirit of the section, and would embrace the case of a mortgage.

I think, therefore, that the instrument contained a valid mortgage of the land described in it, and that it was an available security for the performance of the contract to purchase and convey lands to the value of one thousand dollars to and for the benefit of the plaintiff.

H. R. Selden, J., was absent. All the other judges concurred.

Judgment affirmed, with costs.

CAMPBELL v. TOMPKINS.

COURT OF CHANCERY OF NEW JERSEY, 1880.

(32 N. J. Eq. 170.)

*Read and defined
Mile is good as
an executed
gift.*

Bill to foreclose. On final hearing on pleadings and proofs.

THE CHANCELLOR [RUNYON]. This suit is brought to foreclose a mortgage given, October 13th, 1868, by Daniel F. Tompkins and his wife to the complainant, on land of Mrs. Tompkins, to secure the payment, according to the bond of Mr. Tompkins to the complainant, of that date, of \$2100 in one year from the date thereof, with interest, and all national, state, county, city and township taxes which might be assessed upon the money loaned and thereby secured or upon the mortgage or bond. The defense set up by the mortgagors in their answer is, that only \$1100 were lent, and the rest of the \$2100 was an allowance by way of compensation for the trouble and expense to which the firm of

perfectly sound of course. Here was
tion. (?) That that obligation was partially
Said immaterial as under seal. &
Probably was divisible. 1100 that wd
off is loan & leave other 100 on gr
if not under seal from to pay,
probably be bad. If not divi
~~might~~ ^{wd be} bad on grd of usury
in N.J. N.J. ^{at time} ~~still~~ ^{if} had usury la
prohibs int over 6% + forfeits all
Steinson, St. Law. § 4811, 4822. more construe
whether N.J. still has usury law did
look up. No intent that shd be int. so prob. u
wd not apply. If not usury pretty clearly

The bond being valid there was
obligation. Only remaining question
will a voluntary oblig. be enuf? N
som why it should not be. To.

Cf. a mtge given to secure a
cedent debt. That good. No nee
said for mtge. But could usury
is a complete gift.

→ This is in Equity; Eg. generally
not enforce voluntary bonds. In p
closing mtge Eg. must either be g
on grd that mtge is good us. ^{oblig} ^{an}
or else be ~~enforced~~ ^{negotiating} a voluntary
Now a mtge is good us. an oblig
so intended, but apparently if intent
to secure an oblig. & that oblig. d
exist then fail. But here is
good legal oblig. Eg. is not as
(1) to enforce the oblig, the bond, at
Hardly true, take case of deficiency
ment. Of course foreclosure imp
did not contemplate that. But in
of course deficiency to and advance
hand given. When foreclosure by sale

advanced, the amt received on the sale discharged the debt pro tanto and mgtge then had to sue at law for bal due on debt. A very few states held that Equity - cd give a deficiency judgment. N.Y. was not one of them. But a St in 1866 authorized Ch. to do so. Now that St might well be construed as simply giving Eq. power to give deficiency judgment in place of law Ct & whenever law Ct wd give it. Thus deficiency T. wd be really action at law & arg. that Eq. is enforcing a voluntary bond wd fail. N.Y. in 1880 re-pealed the St. & now mgtge has to sue at law for deficiency. But are Sts in most states like N.Y. St. of 1866. So objection as to deficiency T. may be set aside. So equity is not enforcing bond at all.

(2) Is this a case where mgtge given to secure oblig. & is none? No. Is perfect oblig. at law. Equity often has to take notice of legal rights, as where conflicting equities depend for priority on who has legal title? So was obligation here which mgtge was to secure. If ^{personal} oblig. nec. we have it. But of course "Oblig. is not nec."

(3) But then we come to this question. Eq. is asked to foreclose mgtge. Is not that aiding a volunteer by cutting off mortgagor's equity. True legal int has passed by mgtge - mgtge has that w/o aid of Equity. Also mgtge has Equity lien w/o aid of Equity. But benef. int. subject to lien mgtge still has. Why will Eq. aid a vol.

Campbell, Lane & Co. (of which the complainant was a member and for which the bond and mortgage were taken, though taken in the name of the complainant alone) had been subjected by reason of the defense made by the firm of Nichols & Tompkins (of which Mr. Tompkins was a member), against certain promissory notes put by the latter firm on the money market, and bought by Campbell, Lane & Co. The notes amounted in the aggregate to over \$7000. The result of the litigations was that Campbell, Lane & Co. recovered only what they had paid for the notes, with interest. The litigations were ended and the money for which judgment was recovered therein paid before the mortgage was given.

When the agreement for the mortgage was made, Mr. Tompkins applied to the complainant for a loan of \$1000 on mortgage of the premises described in the mortgage. Wholly of his own accord, and without suggestion from the complainant, or any member of his firm, or any one else on his or their account, Mr. Tompkins proposed that if the loan was made the mortgage would be given for such an amount as to include a sum sufficient to compensate Mr. Campbell's firm for their expense and trouble in prosecuting the suits upon the notes. This proposition was wholly voluntary on his part, and the amount of the proposed compensation (\$1000) was fixed by him.

Mr. Campbell acceded to the proposition thus made, and made the desired loan, the amount of which was, at the request of Mr. Tompkins, raised from \$1000 to \$1100, and took the mortgage. In 1876, before the commencement of this suit, the complainant bought the interest of his partners in the mortgage, so that when this suit was brought he was the sole owner of the mortgage.

By their answer, Mr. and Mrs. Tompkins insist that, as to the \$1000 included in the mortgage as compensation for expense, trouble, &c., in the litigations on the notes, the mortgage was without consideration, and that, therefore, there should be no decree for that money; or, if there should be any decree on that account, it should be for a smaller sum. They insist that \$1000 was an unreasonably large allowance on that account. Neither in the answer nor in the testimony is any fraud alleged or even hinted at. The conduct of the complainant appears to have been entirely fair. Nor is it alleged that any manner of deceit or misrepresentation was practised on Mrs. Tompkins, nor that she was not fully apprised of all the particulars of the transaction which resulted in the mortgage. The only question, therefore, is, whether the defence of want of consideration is available to the mortgagors.

The seals to the bond and mortgage import a consideration, and, before the passage of the act "concerning sealed instruments," which was approved April 6th, 1875 (Rev. p. 387), neither a court

(1) No consid
rec. on
sealed.

of law nor equity would allow the consideration of such instruments to be inquired into with a view to declaring the instrument void for want of consideration, but a court of equity would do so for the purpose of ascertaining what was due upon it (*Farnum v. Burnett*, 6 C. E. Gr. 87). That act provides that in every action upon a sealed instrument or where a set-off is founded upon a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted as if such instrument was not sealed. That act is a mere change of the rule of evidence and does not operate to make a valuable consideration necessary where the requisite did not exist when the contract was made (*Aller v. Aller*, 11 Vr. 446).

Error of
Course.

Cont.

Cont.

As before stated, the mortgage in this case was given in 1868, prior to the passage of that act. It cannot be doubted that even now a valid mortgage may be given where no valuable consideration exists. Otherwise, the absolute control of the owner over his property is taken away, for he would not be permitted to give it away in his lifetime by deed. The mere fact that there was no consideration would not now render the mortgage invalid. A mortgage may be sustained as against all except creditors whose claims existed at the time of giving it, although it was intended merely as a gift; and, when executed and delivered, it is as valid as if it were based upon a full consideration, and it is not open to the objection that it is a voluntary executory agreement, but it may be enforced according to its terms as an executed, conditional transfer of the real estate mortgaged (*Brooks v. Dalrymple*, 12 Allen, 102; *Bucklin v. Bucklin*, 1 Abb. App. Dec. 242; *Jones on Mort.*, § 614).

(2)
Gift of mortgage
good.

In this case there was no fraud, illegality or oppression. The act of the mortgagors in giving the mortgage to secure the payment of the compensation, was entirely voluntary and was the result of Mr. Tompkins's unsolicited and uninvited proposition. He made it part of the consideration of the loan which he solicited, and it is, perhaps, not too much to say that without this inducement the loan would not have been made.

The voluntary mortgage by the wife of her land to secure the payment of her husband's bond is binding upon her not only so far as the loan is concerned, but as to the debt voluntarily created by him against himself and arising from a merely moral obligation which he acknowledged without demand or even solicitation, but solely from his sense of justice. A married woman may, with her husband, mortgage her land to secure the payment of the debt of her husband or of any other person, for the payment of which she is in no way liable and in which she has no interest (*Jones on Mort.*, § 113). And her mortgage, given to secure the payment of the bond of her husband, will not be regarded as having no validity or bind-

lender to get that? Can it be argued that mortgage is executed, that one of incidents of mortgagor's estate is it to foreclose, that equity is not giving him anything more but merely enforcing what he has?

Pretty clearly mortgagor has legal title & can recover pos. That is an incident of title, not a separate right. These two cases are only ones that find right in point. Both allow foreclosure. Other talk looks same way. Prob. they wd be followed, but must be considered an open question. Cf. same question as

to executed illegal mortgage where parties are in pari delicto. p. 241 et seq. There is that will not allow foreclosure. Prob. distinguishable as in illegality cases the doctrine of leaving parties where they have put themselves comes in strongly.

of
lender

Sound case. But

(1) A personal oblig. is not necessary.

(2) A mortgage may be a gift - it requires no consid. It is an executed gift of a good. Then so whether lien or title theory taken; also whether is gift of personal oblig. at same time or not.

But

(3) Must be intent to have land good for a certain amt. of money. If not given with idea either of securing a personal debt or as a gift of a conveyance of a limited interest in the land, then - no good. That is our case. May say rule is that must be either - personal oblig or else oblig on the land.

(4) Of cases where mortgage intended to secure a personal oblig. & that never arises from lack of consid. There mortgage fails. Cannot secure personal oblig. & that only thing intended. Even if gift of mortgage note & mortgage probably neither good. Note no good & mortgage wd fall with it. But query. Cases are cases where as in our case gift not really intended.

(5) Can consid. be denied totally when mortgage states consid to be seal? Yes. O.K. Rule is. denying consid. only means that cannot show none for purpose of making out that instrument is not a good conveyance, as that it is not a good bargain & sale deed, or that was a resulting use which statute wd execute. Can

ing effect simply because the consideration of the bond is an obligation merely moral and not enforceable at law or in equity.

There will be a decree in accordance with these views.

*Mortgage given without consid & not
to receive any proceeds, then
created, or future obligation
is in effectual. Father* BAIRD v. BAIRD.

trial judges from COURT OF APPEALS OF NEW YORK, 1895.

*2 sons to prevent
them squandering
the prop.* (145 N. Y. 659.)

Appeals from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon orders made October 2, 1894, which affirmed judgments in favor of defendants entered upon decisions of the special county judge of Monroe County on trial at Special Term, dismissing the complaint in each action.

The following is the opinion in full:

"Prior to the year 1873, John Baird, the plaintiff's husband and testator, was the owner of the farm which is covered by the two mortgages sought to be foreclosed in these actions. In that year, his two sons, William and James, defendants, went into possession of it, and the father directed the assessors to transfer the assessment on the farm to his sons. They have remained in possession ever since. In October, 1874, the father deeded the farm to the sons, who took title under these deeds as tenants in common. It appeared that the father had two other farms, all of which had been paid for and improved with the aid of the labor and services of his sons, who had worked for him after their majority. On a settlement between the father and the two sons, it was agreed that he was indebted to them in the sum of \$5000, and that was the consideration for the conveyance. A deed was given to each son conveying an undivided half of the farm in consideration of \$2500. The evidence tended to show, and the trial court has found, that the intention was to vest the title in the sons in fee; but it appears that the father had some fears that his sons would not be able to take care of the property thus conveyed and that it might be lost in speculation or otherwise. In order to prevent such a result, as he said, he required the sons to give back to him mortgages for \$1500 each on the farm. No bond was given and no actual debt was intended to be secured, and they were not recorded by the father in his lifetime. With respect to the purpose and consideration of these mortgages the testimony tended to show, and the trial court found, that they were not intended to

*no oblig. except
on note if any
in that.*

secure any debt or to be or become a valid subsisting security, or to be recorded or enforced, and were, in fact, without any consideration whatever. In the year 1875 the wife of John Baird, and mother of the defendants, died, and the year following he married the plaintiff. He died in 1883, leaving a will, in which the plaintiff was named as executrix. In that capacity she brought actions against each of the sons to foreclose the mortgages given by them respectively. The complaint was dismissed in each case and the judgments were affirmed at General Term. There are two appeals and two records, but both judgments rest on precisely the same facts, and the questions involved in both appeals are identical. Both cases may, therefore, be conveniently considered and disposed of as one.

"The plaintiff's right to enforce the mortgage is the same and no other than the mortgagee, her husband and testator, had in his lifetime. She stands in the place of her husband, and cannot enforce the instrument unless he could, and every defense that the defendants could urge against the mortgage during the life of the father, they may interpose now against his personal representative. The instruments purport to have been given to secure the payment of money, but it was shown at the trial affirmatively, and found by the trial court, that no debt in fact existed in favor of the father against either of the sons; that there was no intention to give the mortgage on the one hand, or to hold it on the other, as security for any debt; that in fact there was no legal or equitable consideration moving between the parties and no intention on either side to treat the instruments as binding obligations or as valid or subsisting securities. The evidence upon which these findings were made, if competent, was sufficient and the fact is not open to question or review here.

"The findings are based upon the business relations which the parties occupied to each other before the father gave up the possession of the farm to the sons and then conveyed it to them, taking back the mortgages in question, and upon his subsequent conduct and declarations as to the character of the instruments and the purpose of their execution and delivery. The general principle that an instrument under seal, in the form of a mortgage upon real estate, which upon its face expresses a consideration and purports to have been given as security for a debt may, nevertheless, as between the parties, be shown to have been purely voluntary or without any consideration, and so invalid, is not denied (*Davis v. Bechstein*, 69 N. Y. 440; *Hill v. Hoole*, 116 *id.* 299; *Briggs v. Langford*, 107 *id.* 680; *Thomas on Mort.* § 847; *Jones on Mort.* § 1297).

"The point upon which the learned counsel for the plaintiff

U.K. -

See end

Show no consid. to establish fraud or lile.
So here not denying that is a suffi-
cient Conveyance but showing that
Conveyance will not be allowed to
take effect because its purpose is
not a utge purpose - no intent to
secure money at all.

relies is that evidence was not admissible at the trial to wholly contradict and defeat the instruments by showing, contrary to what appeared on their face, that they were intended to have no operation whatever. It is sought to distinguish this case from that of a deed, absolute upon its face, which may be shown to be in fact a mortgage, and from the numerous other cases in which equity permits a party to show that an instrument, appearing upon its face to be of one character, is or ought to be in truth of quite another character. It is said that the principle upon which these cases rest gives no sanction to what was held by the court below in this case, that a party may impeach his deed by showing, not only that it was without consideration, but that it was intended to have no validity or become of any binding force whatever.

"The desire on the part of the father to retain some sort of guardianship over the title to the farm which he had conveyed to the defendants was, perhaps, natural enough under the circumstances, and it is frequently shown in such transactions. That the mortgages were not intended to be held by him for any other purpose is supported by the circumstances that no bond was given, that they were not recorded, and no claim was made by the mortgagee during his life, a period of about nine years, that they were in his hands for any other purpose or for the payment of either principal or interest though past due. All the circumstances, when considered with the proof of the statements and declarations of the father, were sufficient to warrant the findings of the trial court with respect to the real purpose with which the instruments were made and their true consideration (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225). "The presumption of some consideration that arose from the presence of a seal was overthrown, and we must assume that the instruments were without consideration of any kind (*Gray v. Barton*, 55 N. Y. 68; *Best v. Thiel*, 79 *id.* 15; *Torry v. Black*, 58 *id.* 185; *Home Ins. Co. v. Watson*, 59 *id.* 395; *Dubois v. Hermance*, 56 *id.* 673).

"There is no reason that we can perceive for giving to these instruments any greater force or effect than was contemplated by the parties when they were executed and delivered. There is no estoppel or any right which attached in favor of third parties, and we are not aware of any principle which would now require a court of equity to treat these instruments as valid subsisting obligations unless they were intended as such when made, and this is negatived by the findings.

"Nor do we perceive any good reason why the real purpose and true consideration and object of the mortgages should not be made to appear when the aid of a court of equity is invoked for their

enforcement. The authority relied upon by the learned counsel for the plaintiff in support of his contention is a remark of Judge Rapallo in the case of *Hutchins v. Hutchins*, 98 N. Y. 56, in which it is said: 'It has never been held that a deed can be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no right whatever under it, or that he should reconvey to the grantor on his request without any consideration.'

"That remark must be understood with reference to the facts of the case then under consideration, which was the case of a deed absolute in form but intended as a mortgage. The defendant's answer was, however, so drawn as to leave room for the construction that he intended to urge that the conveyance was intended to be wholly inoperative, or in trust, or to secure a debt which the parties had agreed should never be paid, and it was with reference to this feature of the case that the expression was used. It was applicable to the case then under review, but cannot be regarded as authority for the proposition that the defendants in this case are precluded from showing that the mortgages were without any consideration in fact, or that they were not intended by any of the parties to have the effect of incumbering or defeating the title which the father had just conveyed to his sons. The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing, by way of defense, the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent (*Juilliard v. Chaffee*, 92 N. Y. 529). The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate (*id.*). Parol evidence may also be given to show that a writing, purporting to be a contract or obligation, was not in fact intended or delivered as such by the parties (*Grierson v. Mason*, 60 N. Y. 394). So, a conveyance absolute in form may be shown, as against the heir at law of the grantee, to have been made in trust for the benefit of a partnership firm, of which the grantee was a member, and so held by him in trust for the firm (*Bank v. Grote*, 110 N. Y. 12). Of course there may be cases where the rights of innocent third parties intervene to modify or change the rules, as in the case of negotiable instruments, or where there exists some element of estoppel,

but as between the parties to the instrument there is no reason why the truth, with respect to the real object and consideration of the instrument, may not be made to appear. The plaintiff was not entitled to maintain the actions for the foreclosure of the mortgages unless it was found that there was some debt due to her for the payment of which they were the security. The findings are that no debt ever existed, and this is conclusive against the plaintiff's right of action. In an action to enforce a mortgage by sale of the land the amount, if anything, of the lien is an issue which the parties certainly have the right to contest. It is the debt which gives the mortgage vitality as a charge upon the land, and generally where there is no debt or obligation there is no subsisting mortgage. The instruments contain a consideration clause and a seal, and much of what has been said by courts and writers to the effect that a party cannot be permitted to defeat his own deed by parol proof is based upon the importance which was attached to the presence of these conditions in an instrument by the common law. The conception that some consideration was necessary to support every promise and covenant was borrowed from the civil law, but the consideration was formerly deemed to be conclusively established by the presence of the consideration clause or the seal. It was originally supposed that the recitals and clauses of a contract expressing a consideration could not be varied by parol proof to the contrary, but that rule was gradually abandoned and now that clause is open to parol proof (*McCrea v. Purmot*, 16 Wend. 460; *Hebbard v. Haughian*, 70 N. Y. 54; *Ham v. Van Orden*, 84 id. 269). So, also, the conclusive presumption of a consideration which formerly arose from the presence of a seal was modified by statute, and it is now open to the maker of such an instrument to allege and prove the absence of any consideration in fact as a defense (3 R. S. [5th ed.] 691, §§ 77, 78; Code, § 840).

"There are, it is true, expressions to be found in some cases to the effect that while the question of consideration is open to be varied by parol proof, yet the party cannot be permitted to claim that a deed or other instrument with a consideration clause or a seal, or both, is wholly without consideration, and thus entirely defeat it. If this idea is anything more than a somewhat shadowy and fanciful remnant of the ancient law, it is not easy to define its precise scope or practical application when applied to an executory instrument like a mortgage. To say that in a case like this it is open to the defendant to reduce by parol proof the sum expressed as the consideration to one dollar or any other nominal sum, but that he cannot go any farther, would be to confess that the distinction, if it exists, is altogether without substance. The instrument would be defeated in either case. It is quite certain

If we are
personally
willing.

Doesn't un-
derstand
its history
apparently.
But rule
doesn't ap-
ply to mortgages
and not de-
nying that
consequence
is good enough, but
are attacking it
because allege
no debt of any
kind.

that by recent adjudications deeds and other instruments have been defeated, in a great variety of cases, by parol proof of want of consideration, or that they were delivered upon conditions which would render their use for any other object a fraud upon the maker, or that the purpose for which delivery was made was different from that indicated upon their face. It will be sufficient to refer to some of the cases without further comment: *Reynolds v. Robinson*, 110 N. Y. 654; *Blewitt v. Boorum*, 142 id. 357; *Andrews v. Brewster*, 124 id. 433. So, also, actions to foreclose mortgages have been defeated upon allegations and proof differing in no substantial respect from that appearing in this case (*Briggs v. Langford*, 107 N. Y. 680; *Hannan v. Hannan*, 123 Mass. 441; *Wearse v. Peirce*, 24 Pick. 141; *Hill v. Hoole*, 116 N. Y. 299; *Davis v. Bechstein*, 69 id. 440; *Parkhurst v. Higgins*, 38 Hun, 113). There may be cases, no doubt, where the party will be held estopped by his deed from claiming that it is void for want of consideration, especially where by its terms it appears to be an absolute conveyance of land (*Matter of Mitchell*, 61 Hun, 372). A voluntary conveyance, intended to take effect as such, and not executory, is generally good between the parties without actual consideration, but that principle has no application to this case. It is not quite correct to say that the defendant was permitted to show by parol that these instruments were never to have any operation or effect. They were in fact executed and delivered for a purpose, though not to secure the payment of money, and they may have accomplished the very object contemplated. That was to protect the defendants against their own improvidence in contracting debts upon the faith of their title to the farm. Whether that purpose was lawful, or practicable, or possible, or the contrary, is quite foreign to the inquiry. It is enough to know that such was the motive and consideration in the minds of all the parties which induced the execution and delivery, and no other. Having procured them in that way, it would be unconscionable now for the mortgagee or his personal representative to use or enforce them as obligations for the payment of money.

"The defendants had been in possession of the farm under the final contract between them and their father to convey it to them, in consideration of the amount found due upon the settlement, for more than a year before the deeds or mortgages were given. During that time they were in a position to enforce specific performance, and hence the execution and delivery of the mortgages were purely voluntary acts on their part, and constituted, so far as appears, no element of the consideration for the deeds.

"The acts and declarations of the mortgagee with respect to the consideration, conditions and purpose under which the instruments

Cont.

were made and delivered, being admissions against his interests, would have been competent proof against him in a suit to enforce the mortgages in his lifetime, and hence are now competent against the plaintiff who represents him (*Holmes v. Roper*, 141 N. Y. 67; *Lyon v. Ricker*, *id.* 225; *Hobart v. Hobart*, 62 *id.* 80).

SW.

"We think there was no error in the result and that the judgments should be affirmed, with costs."

W. A. Sutherland for appellant.

George A. Benton for respondent.

O'Brien, J., reads for affirmance.

Bartlett, J., concurs; Peckham and Gray, JJ., concur in the result; Andrews, Ch. J., dissents; Haight, J., not sitting.

Judgments affirmed.

8 at 652.

CHAPTER III. (Continued).

SECTION II. ILLEGAL OBLIGATIONS.

WHALEY v. NORTON.

HIGH COURT OF CHANCERY, 1687.

(1 Vern. 483.)

omit. *dictum*
Held a bond given as a recompense for past illicit intercourse will
 The bill was to be relieved against a bond and judgment, defeaz-
 anced for the payment of 400*l.* to the defendant; and the bill
charged, that whereas the security recited 400*l.* to have been lent
and paid by the defendant to the plaintiff, that in truth the money
was never really lent or paid: the defendant by answer confessed,
that the 400*l.* was not lent or paid by her, and that it was never
meant or intended so to be, and that it was the mistake of the
scrivener in making the security after that manner, for that the
400*l.* thereby intended to be secured was the free gift of the plain-
tiff unto the defendant. *he ordered*
give up
if the
woman
was a
prostitute
+ really
led play
away.

The truth of the case was, that the defendant was for some time
 kept by the plaintiff, and this 400*l.* was given her upon that ac-
 count; but of that no notice was taken in the bill, and the counsel
 for the defendant insisted, that it being a free gift, no equity could
 relieve against it; and cited the case of *Bourman and Uphill*,
 which was this very case in point, and the equity laid in the bill
 the same, to wit, that it purported to be a security for money lent;
 whereas no money was really lent or paid: and the Court would
 not relieve in that case, though the gift was upon the like account:
 and the case of *Peacock and Mainlin* was also cited.

THE MASTER OF THE ROLLS [SIR JOHN TREVOR] said, that there
 would be a difference in these cases between a contract executed
 and executory; and that this Court would extend relief as to things
 executory, which if done, it maybe might stand: but as this case
 was, he saw no ground to relieve the plaintiff, nothing appearing
 to him, but it was a free and voluntary gift, without anything of
turpis contractus: and in case it had been so, yet we know that
 Adam was punished, though tempted by Eve; because he would
 be tempted. But if it had been charged in the bill, that the de-
 fendant was a common strumpet, and she commonly dealt and

Seems has nothing to do with judges except that notes bring out distinction. Notes are executed & an executory transaction.

- (1) Contracts for future intercourse are bad & will not be enforced for either party. Ct. considers them in pari delicto.
- (2) Contract (Sealed or for consid.) the nature of which is to compensate for past cohabitation are valid. But must be sealed or new consid.
- (3) Our case overruled in Eng. probably so far as it makes an exception where woman was previously loose & possibly did the seducing.
- (4) No? of illegality except in (1) above. Suppose these not Contract but Conveyance. Quotations in note say that conveyance will not be set aside. If in pari delicto that O.K. Accords with policy of law to discourage illegality.

Court seems to have treated this as a
Conveyance - really an Equit. title. Court
says that if only parties to deed - mean-
ing probably father & W - were concerned
he would let matters stand. But since
others concerned - the children apparently -
he will set deed aside. The daughter
in? and other children perhaps not
in pari delicto. If so, case clearly
O.K. Party wronged shd be allowed
to get set right again.

So case does not involve? as to
whether title an executed or an execu-
tory transaction. Up later.

Court says wd be defense at law
to deed & so he will order it delivered
up. If right, must be on analogy
to quieting title. Court seemed to
do it merely to prevent matter get-
ting further into Courts.

practised after that sort, and used to draw in young gentlemen, in such case he thought it reasonable the Court should relieve; and the plaintiffs had, in this cause, proved as much; but the defendant's counsel opposed the reading to that matter, by reason it was not charged in the bill, nor in issue in the cause; so they prayed liberty to amend their bill, and to charge that special matter, paying the costs of that day, and of the depositions taken in the cause.¹

omit.

W—— v. B——.
B—— v. W——.

THE ROLLS COURT, CHANCERY, 1863.
(32 Beav. 574.)

*- to surrender copy bill
Held a bond given for
securing money advanced
partly to secure to
under father's
permission to
under's attempt*

THE MASTER OF THE ROLLS (SIR JOHN ROMILLY).²

This is a case which has caused me considerable pain; but I can state very shortly why I think that this deed cannot be supported.

There are two suits, one to enforce a deed of the 20th of August, 1855, by which, in consideration of 1700*l.* lent by the defendant Mr. W. to Mr. B., Mr. B. and his five children (two only of whom were adult) covenanted to surrender copyholds for securing that amount. The second suit is instituted by B. and his two daughters to set that deed aside.

*- to seduce
daughter
will be
ordered
given up.*

The case is a very painful one in this respect: It appears that Mr. W. seduced C., one of Mr. B.'s daughters, and that in June, 1855, Mr. T., a brother-in-law of Mr. B., had pointed out to him the attentions paid to his daughter by Mr. W., that it was a matter of notoriety in the town in which they resided, and that it was essential to put a stop to it. At the same time, Mr. T. told him

¹ "Has there been any case upon that distinction [between a recompense for past and a provision for future cohabitation], where the court, finding the woman in actual possession of the property, has upon that ground taken it out of her hands? The distinction upon the doctrine of *præmium pudicitiae* has prevailed in the case of restraining her from enforcing a security. But I doubt whether there is any instance of taking the property out of her hands, except as to creditors."—Per Lord Eldon, L. Ch., in *Rider v. Kidder*, 10 Ves. 380, 386 (1805).

² "Even in cases of a *præmium pudicitiae*, the distinction has been constantly maintained between bills for restraining the woman from enforcing the security given, and bills for compelling her to give up property already in her possession under the contract. At least there is no case to be found where the contrary doctrine has been acted on, except where creditors were concerned."—Story, Eq. Juris., § 290 (1846).

³ The statement of facts and a portion of the opinion are omitted.

he should require the money due to him to be repaid, which consisted of 1100*l.*, and two sums of 300*l.* each for which he was surety. When T. required the money to be repaid, Mr. B. applied to Mr. W. for an advance. A day or two after, in June, 1855, in consequence of the strong remonstrances of Mr. T. and of Mrs. T., who was the aunt of this young lady, Mr. B. wrote a letter to Mr. W., in which he told him, that in consequence of the reports, he must discontinue his visits to his house. In answer to this, Mr. W. wrote that there was no truth in the suggestion, but that he acquiesced in the propriety of the refusal to allow a continuance of his visits. On the following day after writing this letter, Mr. W. wrote to Mr. B. and told him that he would advance the money required by Mr. B., and a treaty took place, and it was arranged that the advance should be made, and it was effected on the 20th of August, 1855, about two months after.

It is impossible to read the letters and the evidence in this case, and not come to the conclusion, that a part of the consideration for the advance of the money by Mr. W. and for the security which was given, was a promise that W. should be at liberty to continue his visits to the daughter. It is impossible that the father should not have been aware, after all the representations made to him by Mr. T. and by the public talk, that Mr. W. had, at that time, actually succeeded in seducing, or that he was attempting to seduce, his daughter. It is impossible to doubt the fact that the money was given in order that Mr. W. should be allowed to continue his attentions to the daughter, whether successful or not.

I am of opinion, in that state of the evidence, that no person can come into a Court of Equity and ask that effect should be given to a deed, the consideration for which was of that character. The Court is compelled to look at the whole of the consideration, and cannot execute the deed in part. And I am of opinion that no person can, on such evidence and facts as are here established, require this Court to give any assistance to either party concerned in such a transaction.

It occurred to me that I could leave the matter there, but, observing that others besides the parties to the corrupt bargain are affected by this deed, I am of opinion that I ought not. I am also influenced by this consideration, that, upon an action on the deed, the same defense would be open at law, and I think that I should not act properly, if I did not, as far as I am able, put an end to this painful case. Without saying anything as to what might be done in an action at law to recover the money lent, I shall order the deed to be delivered up to be cancelled.

The grounds on which I decide this case make it unnecessary for me to enter into the consideration whether proper protection



case as have bonds given up & unions int. re-
turned. Court held that the unions int.
pd & so trans action Executed yet no order
its return because parties not in pari
delicto. Debtor is the oppressed. They
said they wd not go beyond the
case where bonds not given up. But
that circumstance shd be immater-
ial. & is not generally required.

Further today action at law is al-
lowed to recover back unions pay-
ments.

was afforded to the two young ladies in this matter; but it would be difficult to see how either of these deeds of 1853 and 1855 could be supported in this Court as against them.

omit.

BOSANQUETT v. DASHWOOD.

COURT OF CHANCERY, 1735.

(*Cas. temp. Talb. 38.*)

cont.

The plaintiffs being Assignees under a Commission of Bankruptcy against the two Cottons, brought their Bill against Dashwood the Defendant, as Executor of Sir Samuel Dashwood, who had in his Life-time lent several Sums to the Cottons, the Bankrupts, upon Bonds bearing 6l. *per Cent.* Interest; and had taken Advantage of their necessitous Circumstances, and compelled them to pay at the Rate of 10l. *per Cent.* to which they submitted, and enter'd into other Agreements for that Purpose; and so continued paying 10l. *per Cent.* from the Year 1710, to the Year 1724.

'Twas decreed at the Rolls that the Defendant should account; and that for what had been really lent legal Interest should be computed and allowed; and what had been paid over and above legal Interest should be deducted out of the Principal at the Time paid; and the Plaintiffs to pay what should be due on the Account: And if the Testator had received more than was due with legal Interest, that was to be refunded by the Defendant, and the Bonds to be delivered up.

Fact.

Held that
it will
order
& that all
payments
of usuri-
ous int.
must be
deducted
from prin-
cipal.

Mr. Solicitor General and *Mr. Fazakerley* insisted for the Defendant, That 'twas hard to inquire into a Transaction of so long standing, the Parties having on all sides submitted to the Agreement, and that *Volenti non fit Injuria*; which was the Reason of the Lord Holt's opinion in the Case of *Tomkins versus Barnet*, 1 Salk. 22. why an Action would not lie for Recovery of Money paid upon an usurious Contract; and that the Bankrupts being *Participes Criminis*, should have no more Advantage here than at Law. Nothing was more common than to admit the Party, after he had paid the Money, to be an Evidence in an Information upon the Statute of Usury; which shews he is, in the Eye of the Law, after Payment, an indifferent Person; And compared it to the Case of Gaming; where, if the Loser pays the Money, and does not sue for the Recovery within the Time prescribed by the Act, he is barred And cited the case of *Walker versus Penry*, 2 Vern. 78, 145.

LORD CHANCELLOR [TALBOT]. There is no Doubt of the Bonds and Contracts therein being good: But it is the subsequent Agree-

(ment upon which the Question arises. It is clear that more has been paid than legal Interest. That appears from the several Letters which have been read, which prove an Agreement to pay 10*l. per Cent.* and from Sir Samuel Dashwood's Receipts; but whether the Plaintiffs be intitled to any Relief in Equity, the Money being paid, and those Payments agreed to be continued, by several Letters from the Cottons to Sir Samuel Dashwood, wherein are Promises to pay off the Residue, is now the Question?

The only Case that has been cited, that seems to come up to this, is that of *Tomkins versus Barnet*; which proves only, that where the Party has paid a Sum upon an illegal Contract, he shall not recover it on an Action brought by him. And tho' a Court of Equity will not differ from the Courts of Law in the Exposition of Statutes; yet does it often vary in the Remedies given, and in the Manner of applying them.

The Penalties, for Instance, given by this Act, are not to be sued for here; nor could this Court decree them. And though no *indebitatus assumpsit* will lie, in Strictness of Law, for receiving of Money paid upon an usurious Contract; yet that is no Rule to this Court, which will never see a Creditor running away with an exorbitant Interest beyond what the Law allows, though the Money has been paid, without relieving the Party injured. The Case of Sir Thomas Meers, heard by the Lord Harcourt, is an Authority in Point, that this Court will relieve in Cases which (though perhaps strictly legal) bear hard upon one Party. The Case was this: Sir Thomas Meers had in some Mortgages inserted a Covenant, That if the Interest was not paid punctually at the Day, it should from that Time, and so from Time to Time, be turned into Principal, and bear Interest: Upon a Bill filed, the Lord Chancellor relieved the Mortgagors against this Covenant, as unjust and oppressive. So likewise is the Case of Broadway, which was first heard at the Rolls, and then affirm'd by the Lord King, an express Authority, that in Matters within the Jurisdiction of this Court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The Reason is; because all those Cases carry somewhat of Fraud with them. I do not mean such a Fraud as is properly Deceit; but such Proceedings as lay a particular Burden or Hardship upon any Man: It being the Business of this Court to relieve against all Offences against the Law of Nature and Reason: And if it be so in Cases which, strictly speaking, may be called legal, how much more shall it be so, where the Covenant or Agreement is against an express Law (as in this Case) against the Statute of Usury, though the Party may have submitted for a Time to the Terms imposed on him? The Payment of the Money will not alter the Case in a Court of Equity; for, it ought not to have been paid: And the Maxim of

•

•

•

•

•

•

•

...ing ... gambling contracts not illegal.
So judges to secure gambling debts O.K. no
doubt. But gambling contracts were to
some extent set aside by Equity even
under early Eng. law: i.e. before St. Anne.
(2) Under modern law by St. or decision of
Court gambling illegal practically every-
where.

(3) But when gambling illegal generally
held that parties are in pari delicto
so while Executory transactions will
be refused Enforcement, Executed
transactions will not be undone.

(4) Acts have generally changed (3) by
providing that ~~Executory~~ ^{executed} transactions
may be set aside.

a. Clearly true of money paid.

b. No doubt same of personally conveyed.

c. Are often special statutes like ours
as to realty conveyed.

d. How about mortgages. (1) Our statute
settled law in Eng of course. (2) Other
sections of it have been held to
be C.L. in America & make gamb-
ling illegal. Perhaps that wd be
held ^{as to the section} similar Acts in some
states. (3) An statute vesting title
in grantor. Seems there wd apply
to mortgages. (4) Statute allowing
property lost to be recovered shd.
apply where no special statute
as to transfers of land. (5) How-
ever no statute then parties being
in equal fault shd depend on
whether mortgage is Executory or
Executed transaction. That later
Seems executed & shd be no recovery.

Volenti non fit Injuria will hold as well in all Cases of hard Bargains, against which the Court relieves, as in this. It is only the Corruption of the Person making such Bargains that is to be considered: It is that only which the *Statute* has in View; and 'tis that only which intitles the Party oppressed to Relief. This answers the Objection that was made by the Defendant's Counsel, of the Bankrupts being *Participes Criminis*: for, they are oppressed, and their Necessities obliged them to submit to those Terms. Nor can it be said in any Case of Oppression, that the Party oppressed is *Particeps Criminis*; since it is that very Hardship which he labours under, and which is imposed on him by another, that makes the Crime. The Case of Gamesters, to which this has been compared, is no way parallel: for, there both Parties are Criminal: And if two Persons will sit down, and endeavour to ruin one another, and one pays the Money, if after Payment he cannot recover it at Law, I do not see that a Court of Equity has anything to do but to stand *Neuter*; there being in that Case no Oppression upon one Party, as there is in this.¹ Another Difficulty was made as to the Refunding: But is not that a common Direction in all Cases where Securities are sought to be redeemed, that if the Party has been over-paid, he shall refund? Must he keep Money that he has no Right to, merely because he got it into his Hands? I do not determine how it would be if all the Securities were delivered up; that is not now before me: I only determine what is now before the Court; and is the common Direction in all Cases where Securities are sought to be redeemed.

And so affirmed the Decree, &c.

STAT. 9 ANNE, c. 14.—*An act for the better preventing excessive and deceitful gaming.*—Whereas the laws now in force for preventing the mischiefs which may happen by gaming, hath not been found sufficient for that purpose; therefore for the further preventing of all excessive and deceitful gaming, be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same, That

¹ "In cases where agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is, perhaps, *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given, and it is given to the public through the party (Story, Eq., § 208)." —Per English, Ch. J., in *Breathwit v. Rogers*, 32 Ark. 758 (1878).

from and after the first day of *May*, one thousand seven hundred and eleven, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entred into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting, as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting, as aforesaid, or that shall, during such play, so play or bett, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in any wise notwithstanding; and that where such mortgages, securities, or other conveyances, shall be of lands, tenements, or hereditaments, or shall be such as incumber or affect the same, such mortgages, securities, or other conveyances, shall enure and be to and for the sole use and benefit of, and shall devolve upon such person or persons as should or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances, had been made to such person or persons so to be entitled after the decease of the person or persons so incumbering the same; and that all grants or conveyances to be made for the preventing of such lands, tenements, or hereditaments, from coming to or devolving upon such person or persons hereby intended to enjoy the same, as aforesaid, shall be deemed fraudulent and void, and of none effect, to all intents and purposes whatsoever.

*If entire part
of land shall
enure to bene-
fit of him
or person
making
them.*

omit.

FANNING v. DUNHAM.

COURT OF CHANCERY OF NEW YORK, 1821.

(5 Johns. Ch. 122.)

The bill, filed August 2, 1813, stated, that on the 26th of October, 1811, the plaintiff and defendant, who had dealings together in the exchange of promissory notes, &c., entered into a written agreement, which recited that the defendant had advanced to the plaintiff, at sundry times, his promissory notes in exchange,

As to this case:

(1) Eq. will not act if relief at law is adequate. Here it found it inadequate. Ct of law had refused to vacate the ~~order~~ ~~230~~ judgment by Confession that had been gotten. 230 →

(2) But will Equity order cancellation of mortgage for usury? Argument Contra is that they are executed transfers. But that is generally held that actions. ^ Yet, no objection now parties not in pari delicto. Transfers of property will not be set aside for usury. All party can do is to recover back the amt. of the usurious interest paid. [Not clear that he can even do that where paid in property & not money. How can it be told that property is

O.K. worth more than prin. & legal int? Seems if Cord. take as full payment that shd be sup. as vs. here: that is usury shd be recoverable in such a case.]

Applying above to mortgage is arguable that the transfer cannot be set aside. But law settled that at least before foreclosure can be set aside. After foreclosure what little authority there is is conflicting. Our case was before foreclosure as to everything but the ship & plant (237 →). But apparently that also undone & all property that foreclosure was not undone (233 ←). The amt realized was simply credited to p/b. Seems no objection to having mortgage declared void where not foreclosed. Parties are not in pari delicto & fact that

...cases occurred shd make no dif.
When property is transferred fully and
unconditionally & when foreclosure
Complete is something to be said for
not ripping it up. But even then
cd be done as to all but B.F.P's.
w.o. wrong perhaps. Hard to tell what
law will be where foreclosure. But shd
hardly rip up as to purchasers at sale & yet they are not B.F.P's.

(3) But if mortgagor seeks Eq. for relief the
practically universal non-statutory
rule was that must do Equity by
paying prin & legal int. This true
whether usury laws avoided whole
Cent., all interest, or double usury
or what not.

Next case shows that this is some-
times overruled by Ct.

(4) If mortgagor is left either at law or
in Eq. he can take full advantage
of the defense of usury w.o. any
limitation of doing Eq.

(5) See card for Ala case in note.
? if that law.

Plt borrowed of def't 19 an debt note & to secure them
a warrant of atty to seize up T., a mortgage on vessels
with power of private sale, mtge of realty with like
power, &c. Def't proceeded at law & by sale to
suprse these securities was succeeding. Bill

SEC. II.]

FANNING V. DUNHAM.

225 to explain

amounting to 188,464 dollars and 88 cents, and for which the de-
fendant was entitled to a commission of two and an half per cent.;
and a further advance of 20,000 dollars, in exchange of notes, was
agreed upon, in four notes, payable in 2, 3, 4, and 5 months, with
the privilege of one renewal; and also, the further advance of
25,000 dollars, in the notes of the defendant, payable at 6, 7, 8,
and 9 months, with notes of the plaintiff in exchange, subject to a
commission of two and an half per cent., as well as the said re-
newals; and thereupon the plaintiff, in consideration of the above
advantages, assigned to the defendant all his right to the ship
Bordeaux and cargo, the ship Tea Plant and cargo, and the
schooner Brothers and her cargo, which three vessels were then on
foreign voyages, and it was agreed that the plaintiff's interest in
the said vessels and cargoes should be sold by the defendant at
auction, on their arrival; and if the commissions of two and an
half per cent. on the said sums, should be equal in amount to the
several sums above stated, then no other charge, more than the de-
fendant's interest at seven per cent., and all necessary charges, as
auction duty, storage, &c., should be made to the defendant; but
if the goods did not amount to that sum, or not arriving, then the
plaintiff guaranteed to the defendant his full commissions on any
deficiency that should so occur; and the defendant was to have full
power to take possession of the interest of the plaintiff on the ar-
rival of the vessels, and to dispose of the same or hold it, at his
discretion, accounting to the plaintiff for the surplus, first deduct-
ing his own demand, due by that or any former agreement.

That in the spring and summer of 1812, the plaintiff, finding it
necessary to raise money, applied to the defendant, who, from time
to time, advanced the plaintiff his notes, in exchange for the plain-
tiff's notes, and his endorsements on the plaintiff's notes, amount-
ing to 103,678 dollars and 16 cents. And it was agreed be-
tween them, that the plaintiff should pay to the defendant
a commission of two and an half per cent. on the amount
of all such notes and endorsements; viz., the plaintiff was to put
into the hands of the defendant (an auctioneer), goods to be sold
at auction by the defendant, and out of the proceeds he was to re-
tain the commission of two and an half per cent. on the amount of
all such notes and endorsements by him advanced, over and above
the usual commissions, expenses, and charges, upon such sales
made at auction, if such proceeds on sales should be sufficient for
the purpose; and if not, the balance or deficiency should be made
up and paid by the plaintiff to the defendant. That as a condition
of this last agreement, the plaintiff, upon receiving the notes and
endorsements of the defendant, always gave his own notes to the
defendant, in exchange for the amount of his notes and endorse-

such on
ground
that all
was used
since
on every
loan pl'tf
had agreed
to pay def't
2 1/2 % Com-
mission
above legal
interest.
1st def't
can get
relief or
pl'tf in
equity - why
in paying
from. &
lawful
interest.
2nd if he
was
def't he
could have
instrument
declared
void un-
lawfully.

ments, payable respectively, in each instance, one day before the day on which the notes of the defendant, or the notes of the plaintiff, endorsed by him, were payable.

That on the 9th of March, 1812, to secure to the defendant payment of his notes and endorsements and his commission thereon, the plaintiff assigned to him one hundred shares in the West Chester Manufacturing Society; and on the 27th of April, 1812, for the same purpose, the plaintiff gave to the defendant a bond conditioned to pay 100,000 dollars, with a warrant of attorney to confess judgment thereon; but no judgment was to be entered, until there was a default of the notes or endorsements; and on the 12th of May, 1812, the plaintiff, for the same purpose, gave to the defendant another bond conditioned to pay 30,000 dollars, and also a mortgage by him and his wife on lands at New Rochelle and Pelham, in the county of West Chester.

note of land

That on the 27th of August, 1812, the defendant gave to the plaintiff a declaration or deed of trust, reciting that the plaintiff was indebted to him in the sum of 43,818 dollars and 30 cents, in promissory notes therein specified, and for securing the amount of those notes, and such other moneys as the plaintiff owed, or might owe to him by the renewal of the said notes, or otherwise, the defendant held the said bond and mortgage, the one hundred manufacturing shares, the ship called the Zephyr, one-third of the ship Tea Plant, and the said bond and warrant of attorney; and that when the notes and other moneys were paid the bond and mortgage should be cancelled, and the other property given up or re-assigned to the plaintiff. To this deed was annexed a schedule of the notes. That the last mentioned writing was given in lieu of, or as a substitute for, the agreement of the 26th of October, 1811. The bill set forth the exchange of several notes between the parties, and that the plaintiff gave the defendant a note for 229 dollars and 47 cents, with an endorser, for the commissions, or premium thereon. It then set forth other exchanges of notes, and that the defendant's notes were less than the plaintiff's, by the amount of the commission of two and an half per cent. That other exchanges of notes took place; and that on the 21st of August, 1812, the plaintiff gave to the defendant six promissory notes, with an endorser, amounting to 6898 dollars and 20 cents, all of which were exclusively given for premiums or commissions on the exchanges of notes, as stated in the bill, that sum being the balance, after crediting the amount of sales of the goods of the plaintiff at auction. That several of the notes mentioned in the schedule, besides one of the premium notes for 1149 dollars and 70 cents, were paid by the plaintiff, when they fell due. The bill charged that the defendant had no other notes or demands against the plaintiff, but

such as were specified in the schedule, taking out such as were before specified as paid; and that all the notes remaining unpaid were usurious and void in law; and that the bond and warrant of attorney, the bond and mortgage, the assignments of ships and shares held as security for the payment of those notes, were also void in law. That on the 18th of December, 1813, before any of the notes became due and remained unpaid, the defendant fraudulently entered up a judgment on the said bond and warrant of attorney, in the Supreme Court, and issued an execution thereon to the sheriff of the city of New York, with a direction thereon endorsed, to levy 37,505 dollars of debt, and the costs. That in January term, 1813, of the Supreme Court, the plaintiff applied to that Court, who ordered the execution to be set aside, and awarded a feigned issue between the parties, to try whether the bond and warrant of attorney, and the notes for which they were given as collateral security, were not founded on usurious contracts or considerations. That the plaintiff caused the feigned issue to be made up, and gave notice of the trial thereof at the Kings Circuit, in June, 1813, but the trial was put off by the defendant. That the defendant, in February, 1813, fraudulently advertised the mortgaged premises for sale at auction, by virtue of the power contained in the mortgage. That he also advertised and sold at auction, one-third of the ship Tea Plant, so assigned as security, and fraudulently and by force dispossessed the plaintiff. The bill prayed for an injunction against the defendant from proceeding at law on the mortgage, or selling under it, and from sending the Tea Plant to sea, assigning the notes and other securities, &c., &c., and for general relief.

→ So foreclosed in part.
Mortgage not yet foreclosed

The feigned issue having been tried, and a verdict found for the plaintiff, he filed a supplemental bill, on the 5th of April, 1819, stating the substance of the original bill, and that after the feigned issue was made, but before it was tried, this Court, on the 7th of December, 1813, ordered the injunction, so far as it prohibited the defendant from selling the mortgaged premises, to be dissolved, unless the plaintiff should, within eight days, bring the money due on the mortgage into Court; and that on the 16th of December, 1813, the plaintiff appealed from that order, to the Court for the Correction of Errors; but it was, afterwards, agreed between the parties, that proceedings on the appeal should be suspended until after a decision on the feigned issue. That the feigned issue was settled, under the directions of the Supreme Court, and the pleadings were set forth in the bill, at length. That the feigned issue was tried before Mr. Chief Justice Thompson, at the sittings, in June, 1815, when the jury found all the issues in favor of the plaintiff; and the bill set out the *postea*, at length, by which it appeared that the jury found that the said bond and warrant of

attorney were made and executed upon an usurious consideration; that the said bond and warrant were made as collateral security, for certain promissory notes made by the plaintiff to the defendant, upon usurious considerations, or upon other engagements and transactions between the parties upon usurious considerations, and that the said promissory notes, for which the bond and warrant of attorney were given as collateral security, were respectively made and delivered upon usurious considerations. That to maintain the feigned issue, the plaintiff gave in evidence the bond and warrant of attorney, the judgment entered thereon, the instrument executed by the defendant, August 27th, 1812, and the schedule (A.) thereto annexed, the answer of the defendant to the original bill, and the cross examination of the defendant's witnesses. That after the verdict, the defendant made a *case*, on which to move for a new trial of the feigned issue; that a motion for a new trial was accordingly made and argued in October term, 1817, and that Court, in January term following, unanimously refused to grant a new trial. That before the *case* was settled, an agreement, dated 7th of May, 1816, was entered into between the counsel of the parties respectively, that the defendant might have a bill of exceptions prepared and signed and sealed, in the same manner, as if it had been tendered at the trial of the feigned issue, to the end that a writ of error might be brought, if either party thought proper, and that the decision which should be pronounced on such bill of exceptions, should be final and conclusive upon all matters put at issue by such feigned issue between the parties. That although the Supreme Court decided against the defendant, he never thought proper to take a bill of exceptions under the said agreement, and bring a writ of error; but has expressly declined doing so. That the writing of the 27th of August, 1812, and the schedule A. annexed thereto, and the bond and warrant of attorney, are the same as are set forth in the original bill. That according to the agreement of the 7th of May, 1816, the verdict and judgment on the feigned issue, as no writ of error has been brought, conclusively establish the fact, that the said promissory notes and other securities, held by the defendant, are usurious and void; notwithstanding which the defendant still holds the notes and securities, and refuses to give them up, but declares his determination to enforce the payment of the moneys for which the notes, &c., were given. That on the 31st of October, 1818, the Supreme Court, by an order, rescinded the order for a feigned issue, and all proceedings thereon, and directed all further proceedings on the judgment against the plaintiffs to be stayed, until the further order of the Court. That in January, 1819, the Supreme Court allowed the defendant to take out execution on the judgment.

That the appeal from the order to dissolve the injunction had been dismissed for want of prosecution. The supplemental bill prayed a similar injunction to the one originally granted, &c., and for general relief, &c.¹

December 1, 1820.—The cause was this day brought to a hearing on the pleadings and proofs.

Riggs and Wells for the plaintiff.

T. A. Emmet for the defendant.

THE CHANCELLOR [KENT]. 1. The first and great point in this case is, whether the charge of a commission of two and a half per cent. uniformly made by the defendant, upon the advance or endorsement of negotiable notes to and for the plaintiff, was usurious.² *Held us.*

2. The next, and the more embarrassing point, is as to the nature and extent of the relief.

If the defendant was endeavoring to enforce any of his securities in this Court, and the present plaintiff had set up and made out the usury, by way of defense, the remedy would have been obvious. The securities would have been declared void, and ordered to be delivered up and cancelled. But the defendant has not resorted to this Court. He has caused a judgment to be entered up at law, upon the warrant of attorney given by the plaintiff; and the Supreme Court have ultimately refused to afford any relief to the plaintiff against that judgment, though that Court awarded a feigned issue, and had the usury in the bond upon which the judgment was entered, established by the verdict of a jury. The defendant has also proceeded to foreclose the mortgage, not by the aid of this Court, but by advertising under a power contained in the mortgage, and it is the present plaintiff who is compelled to come here and ask for relief, which he cannot obtain elsewhere, against the judgment at law and other legal securities infected with usury, by means of the original transactions and responsibilities which they were intended to cover.

? Prob. slip.
Drift and rally
become a
Pltff if sought
Cancellation.

The question now is, upon what terms he can have relief?

The feigned issue, which was awarded by the Supreme Court, upon the judgment in this case, was granted while I had the honor to preside in that Court; and that course was then understood to be the practice of the Court, when a judgment entered by confession was alleged to be affected with usury. And I should have supposed, that if the usury had been found by the jury (as it was in that case, and upon the evidence now before me), that the Court would have administered the same equitable relief that is usually

¹ The statement of facts has been abbreviated.

² The discussion of this point is omitted. The learned chancellor reaches the conclusion that the charge was usurious.

→ granted here, or else have vacated the warrant of attorney, and set aside the judgment, and allowed the party to come in and plead the usury. But from the subsequent proceedings, I am led to infer, that the practice on this subject has been changed since I left that Court, and that all summary interference at law, with judgments upon confession, charged with usury, is now denied.

The history of the practice of the Courts of law, shows the embarrassments attending the subject, and the difficulty of applying a legal remedy, consistently with the rules of law. . . .¹

With respect to the relief that can be afforded here, I take the rule to be, that a plaintiff who comes to a Court of Equity for relief against a judgment at law, or other legal security, on the ground of usury, cannot be relieved, except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this Court to render his claim available, and the defendant sets up and establishes the charge of usury, the Court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever, infected with usury. It is perfectly immaterial, in respect to the application of the principle to the case of the debtor who sues here, whether the usury be confessed by the defendant in his answer, or be made out by proof. The plaintiff must still consent to do what is just and equitable on his part, or the Court will not assist him, but leave him to make his defense at law as well as he can. The case of *Taylor v. Bell*, 2 Vern. 171, is a striking but very harsh illustration of the rule. The plaintiff had given bonds with sureties for moneys borrowed at usury, and a warrant to confess judgment, and judgment was entered thereon. He then brought his bill to be relieved and for an account, and though the answer confessed the facts from which the usury was deduced, relief was denied and he was ordered to pay principal, interest, and costs. So, in a late case in the Exchequer (*Skyrne v. Rybot*, cited in Orde on Usury, 113), where a bond and warrant of attorney was taken in an usurious transaction, the decree was, to take an account of the money really paid, and that on payment thereof the bond and warrant of attorney were to be delivered up. In *Scott v. Nesbit*, 2 Bro. 641, 2 Cox, 183, we have this strong observation of Lord Thurlow: "I take it to be an universal rule," he observes, "that if it be necessary for you to come into this Court to displace a judgment at law, you must do it upon the equitable terms of paying the principal money really due, with lawful interest. I have no idea of displacing a judgment upon any other

¹ The exhaustive examination of the practice of the law courts is omitted.

terms." He directed, in that case, that the judgment should stand as a security for the money actually paid, with legal interest.

The equity cases speak one uniform language; and I do not know of a case in which relief has ever been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms. It is the fundamental doctrine of the Court. Lord Hardwicke, 1 Vesey, 320, said that in case of usury equity suffers the party to the illicit contract to have relief, but whoever brings a bill, in case of usury, must submit to pay principal and interest due. Lord Eldon, 3 Ves. & Bea. 14, after an interval of more than sixty years, declared precisely the same rule. At law, says he, you must make out the charge of usury, and at equity you cannot come for relief without offering to pay what is really due; and you must either prove the usury by legal evidence, or have the confession of the party. In *Eagleson v. Shotwell*, 1 Johns. Ch. Rep. 536, the same rule was followed in this Court, where a party came to be relieved against usury in a mortgage.

I have been thus particular in showing the rule of equity on this subject, because the plaintiff has sought by his bill to have all the securities taken by the defendant, and infected with usury, declared void, and ordered to be cancelled, without offering to pay anything. His counsel have also contended, at the hearing, that the rule in equity, where the defendant either confesses the usury or it is established by testimony, is the same as it is when usury is set up as a defense to a demand in law or equity. All that I can do in this case, consistently with my view of the established doctrine of the Court, is to direct an account to be taken of the dealings between the parties, and to hold the securities which the defendant has taken to be good only for the balance which may appear to be due to the defendant, after deducting all usurious excess in any of his commissions and charges.

The objection that presses upon the subject is that the statute of usury may be, in a great degree, eluded, by taking a judgment bond, which precludes the debtor from an opportunity of pleading the usury in a court of law; and if he can only be relieved upon the principles of a Court of Equity, or by the summary powers of a Court of law, acting upon equitable principles, the usurious creditor is sure to preserve his principal sum and the lawful interest. But this objection was for a long time perceived and felt and endured in the Courts of law, before any remedy could be applied; and though they interfered, at first, most effectually, by vacating the warrant of attorney, and allowing the party to come in and plead, they seem now to have abandoned the case to equitable relief, and to choose to administer no other. It is the folly of the party to have precluded himself from pleading by confessing judg-

ment. *Leges vigilantibus non dormientibus subveniunt.* At any rate, though it were even to be regretted that Courts of law cannot place the debtor in a condition to be enabled to annul the contract altogether, under the sanction of the statute; yet certainly I should introduce a new principle into this Court, if I was now to undertake to displace a judgment at law, upon any other terms than those I have mentioned.

The same objection and difficulty occur in the case of a mortgage taken to secure an usurious loan, with a power to sell annexed to it, by means of which the creditor forecloses his mortgage by an act *in pais*, without calling upon any Court to assist him. The debtor has no relief in that case, but by applying to this Court, and then he must comply with the terms of paying what was actually advanced. He deprives himself, in that case, by the power to sell, as he does in the other by his warrant of attorney to confess judgment, of an opportunity to appear in the character of defendant and plead the usury. These are cases in which the party by his own voluntary act deprives himself of his ability to inflict upon the creditor the loss of his entire debt. Many other cases may be stated in which the same result will follow. The party is in the same situation if instead of resisting the usurious claim he pays it. He cannot then expect assistance to recover back more than the usurious excess. If the warrant of attorney, or the power to sell were procured by fraud, or surprise, or accident, that would form a distinct head of relief, and in no wise applicable to the case. And, perhaps, it is sufficient for the purposes of public justice and public policy, that the law has enabled a debtor in every case in which he does not of his own accord deprive himself of the means, to plead the statute in discharge of his usurious contract, and of his obligation to pay even what was received, and that in all cases he can, by paying the actual principal received and the lawful interest, be relieved from the usurious exaction.

The following decree was entered: "It is declared that the promissory notes given by the plaintiff to the defendant, and specified in the writing in the pleadings mentioned, of the 27th of August, 1812, and in schedule A. to the said writing annexed, and which remain unpaid, are infected with usury, and that the practice stated in the pleadings of asking and receiving a commission of two and a half per cent. upon the exchange of notes between the parties, or upon negotiable paper endorsed by the defendant, was usurious in every instance in which such commission exceeded the rate of seven dollars for the forbearance of 100 dollars for one year, or exceeded that rule, for a greater or less sum, for any other period; and that the pretence set up by the defendant, that the said commissions were taken for and on account of expected de-

posits of goods for sale at auction, was unfounded in point of fact. And it is further declared to be the established doctrine and practice of the Court, that the plaintiff who seeks the aid of the Court to set aside a judgment at law, or other legal security, on the ground of usury, cannot be entitled to relief, whether the usury be established by proof or admitted by the answer, except upon the terms of paying the principal and interest lawfully due thereon, after deducting every usurious excess; and that the judgment and the mortgage and the West Chester manufacturing stock, held by the defendant in this case, and mentioned in the pleadings, are to be deemed and taken as securities only for the balance that may be due after such deduction. It is thereupon ordered, &c., that it be referred to one of the masters of the Court to take and state an account of all the loans or endorsements of notes, or advances in cash by the defendant, to or on behalf of the plaintiff, and of all notes given by the plaintiff to him in exchange, or for commissions, or otherwise, and stated or referred to in the pleadings and proofs, from the commencement of their dealings as therein stated, and that on such accounting, the master in no case allow any commissions to the defendant beyond the lawful rate of interest declared as aforesaid; and that the defendant be charged with all excess of interest received by him, in the shape of commissions or otherwise, during the course of such dealings; and that he also credit the plaintiff with the amount for which his share or third part of the ship or vessel called the Tea Plant sold for, as admitted in the pleadings, and with all other payments made by the plaintiff and credited by the defendant, and that he report the balance, if any, remaining due to the defendant upon such accounting, and that interest be charged and allowed on such accounting, when the same would be proper, according to law and the usage of the Court. And it is further ordered, that the master report to the Court with all convenient speed, and that the question of costs and all further directions be, in the meantime, reserved."¹

¹ This represents the general view (*Heacock v. Swartwout*, 28 Ill. 291 [1862]; *Sutphen v. Cushman*, 35 Ill. 186 [1864]). For the rule applied in cases where the mortgagor is defendant, see *Kuhner v. Butler*, 11 Ia. 419 (1860); *Union Bank v. Bell*, 14 Oh. St. 200 (1863); *Snyder v. Griswold*, 37 Ill. 216 (1865). Compare *Hunt v. Acre*, 28 Ala. (n. s.) 580 (1856).

all in pt.

*Mtge to secure several notes some
usurious, others not. Action to
have mtge cancelled. Sts provided*
WILLIAMS v. FITZHUGH. *that securities for a*

COURT OF APPEALS OF NEW YORK, 1868. *usurious loan is*
(37 N. Y. 444.) *void, also provided that*
Eg. shd not make pay of

The plaintiff sought in this action a judgment declaring certain *prin. or a*
six notes (made by the plaintiff and given to the appellants' testa- *cond. of*
tor, two dated April 3, 1854, for \$5000 each, and four dated July *granting*
6, and July 1, 1854, for \$5000, \$6000, \$6000, \$4000, respectively), *relief. shd*
amounting in the aggregate to \$31,000, and a mortgage upon land *if plaintiff*
in Ohio, given by the plaintiff to secure the payment of the six *Eg. to cite*
notes, void for usury, and adjudging and decreeing that they be *for he may*
given up, cancelled and discharged, and forbidding the prosecution *pay the*
of an action already commenced in one of the courts of Ohio, *non-usur-*
upon two of those notes, or any other action upon any of the said *im. notes.*
notes, or the said mortgage. The original defendant, Allen Ay- *The mtge*
rault, having died pending the action, the action was revived *was partly*
against the respondents, his executors. *for usury*
180 is void

The action was tried at Special Term in the Supreme Court, and *Defy ed*
to sustain the action the plaintiff produced a record of judgment *defeat it.*
which set forth the alleged transactions, in which the notes were *Ex pro con*
given, and by which one of the notes dated in July was adjudged *But if he*
void for usury, and upon the evidence contained in the record the *seeks Eg*
judge, at Special Term, found that all of the six notes were so void, *he must*
and a judgment was rendered declaring the notes and the mortgage *do Eg un-*
to be void for usury, and requiring that the respondents deliver *less sh*
up the notes and mortgage to the plaintiff to be cancelled, and *in contra.*
execute a discharge of the mortgage in such form that it may be *It only for*
recorded in Ohio, so that it may be discharged of record and cease *had mak-*
to be a lien upon the real estate described in it, and further enjoin- *ing pay of*
ing the prosecution of an action (found to be pending) on some of *usurious*
the notes in one of the courts of Ohio, and awarding to the *loan or int*
plaintiff his costs. *a cond. i.*

On appeal to the General Term, the Supreme Court modified the *pay of a non-usurin*
judgment so as to except from the operation thereof the two notes *loan also secured*
for \$5000 each, dated April 3, 1854, on the ground that the before- *by mtge may be made*
mentioned record did not necessarily decide that those two notes *a cond. of granting*
were usurious, and they adjudged that in all other respects the said *Eg. relief.*
judgment be affirmed. The executors (defendants below) appealed
to this court.

Scott Lord for the appellants.

George F. Danforth for the respondent.

WOODRUFF, J. The principal question which was discussed on

(1) If mortgage ~~was~~ to secure a ~~debt~~ and a non-secured debt is it void altogether? It held was, under st. and perhaps thought was at C. L. Citation of Paventon which was not under statute and indicate that. Retter's view is contra; that mortgage is good for legal part. Up under Shaw v. Carpenter, last.

(2) While statute did not make Court of Equity take jurisdiction, yet did not diminish its jurisdiction so here had jurisdiction to remove ~~cloud~~ cloud on title.

(3) Such statute as this N.Y. st. are not common. About a half dozen states apparently. All depends on view you take of usury. Likelihood of great wrong by usury is slight. Better let people contract freely as to that. So better adopt all views tending to lessen restriction. So make plea do Equity st. ^{part loan} ^{share} ^{may} ^{need} ^{regulation} ^{quell} ^{as} ^{special} ^{st.}

(4) Note statute is constructed strictly so plea must do Equity as to claims not usurious. This not enforcing mortgage as to such claims, as Time says it is, but simply refusing to set aside mortgage till Eq. done.

(5) Relief at law inadequate as having a defense at law would not remove cloud from the title.

See notes to last case for gen'l rule where no statute like ours.

Not in pari delicto & so cancellation, even of Executed transaction is O.K.

But gently will not be undone after foreclosure anyhow as to B.F. P's.

this appeal, and which includes nearly all of the subordinate questions raised, is, will the courts of this State entertain a bill to declare void and compel the cancellation of a mortgage of lands lying in another State and executed there in pursuance of a contract entered into in this State to secure loans made and payable in this State, some of which loans are usurious and void by our laws?

*Shows where
utge made.*

This question may be intelligibly discussed by inquiring—first, would such a bill be entertained under the same circumstances if the lands were situated in this State? second, how is the question affected by the location of the lands without our jurisdiction? and, third, should the court require the surrender and discharge of such a mortgage without the payment of the loans which are not found to be usurious?

First, then, suppose the lands were situated in this State.

1st. It cannot be denied, indeed I do not understand the counsel for the appellant to question, that such a mortgage is void by the law of the State of New York. Our statute declares that "all . . . assurances, conveyances, all other contracts or securities . . . whereby there shall be reserved, or taken, or secured, or agreed to be reserved or taken," any greater sum or value for the loan or forbearance of money, than at the rate of seven per cent. per annum, "shall be void." The proposition is, that a security given to secure the payment of money is void if it be given to secure a usurious loan, and if it be so given, the fact that it was also given to secure loans which were not usurious, will not preserve it from entire condemnation. If void in part, it is void altogether.

*Under the
Statute &
by prior
decisions.
Up later.*

upheld - Sup. Ct.

The late learned Chief Justice Jones, in *The Fulton Bank v. Benedict* (1 Hall S. C. 480, 546), thus states the proposition: "It is well settled that if any part of the loan or debt for which the note or security was given is usurious, the security is void;" referring, among other cases, to *Harrison v. Harmel*, 5 Taunt. 780. ✓

In *Jackson v. Packard*, 6 Wend. 415, it is held that a mortgage, given to secure a sum of money, consisting of one loan made prior thereto, which is usurious, and another which is free from usury, is void. "If a mortgage or other security is given for two or more antecedent loans, either of which was infected with usury, the whole security is void." That under the statute "there is no such thing as such an instrument being void in part and good for the residue; the taint of usury destroys the whole security." The debt which was free from usury may be recovered, but the mortgage is void (*Rice v. Welling*, 5 Wend. 595). And in *Hammond v. Hopping*, 13 Wend. 505, the same doctrine is re-asserted in reference to contracts generally. "The statute against usury renders any contract infected with it, utterly void; but if the usurious security was given in part for a pre-existing valid debt, that

debt is not destroyed by the illegal security." These decisions have stood as the law of this State for more than thirty years, and I am not aware that their correctness has been questioned in any of our courts.

2d. If, then, the mortgaged premises were in this State, have our courts jurisdiction to decree that the mortgage be given up and cancelled, and is it error, upon the facts assumed, to do so? The statute is:

"§ 13. Whenever any borrower of money . . . shall file a bill in chancery for *relief* or discovery against any violation of the provisions of . . . this act, it shall not be necessary for him to pay, or offer to pay, any interest or principal on the sum or thing loaned, nor shall any court of chancery require or compel the payment . . . of the principal sum, or interest or any part thereof, as a condition of granting relief.

"§ 14. Whenever it shall satisfactorily appear, by the admission of the defendant, or by proof, that any . . . assurance, pledge, conveyance, contract, security . . . has been taken or received in violation of the provisions of this act, the Court of Chancery *shall declare the same to be void*, and enjoin any prosecution thereon, and *order the same to be surrendered and cancelled*."

This language, taken literally, seemed, not only to confer jurisdiction, but absolutely to require the Court of Chancery to decree the surrender and cancellation of securities infected with usury, of whatever description, whenever the borrower saw fit to invoke the interposition of the court, without the aid of any other ground for coming into that tribunal than the fact of usury. But the chancellor, in *Perrine v. Striker*, 7 Paige, 598, held, that where the party had a full and complete remedy at law, he could not come into the Court of Chancery for relief; that this statute was not intended "to compel the Court of Chancery to take jurisdiction of every question of usury, although a perfect remedy, both as to discovery and relief, could be had in a court of law." Hence, when the parties to a note not negotiable sought a discovery and perpetual injunction against a suit thereon (although the statute authorized the examination of the plaintiff in the suit at law on the trial) on the ground that it was usurious, the bill was dismissed because the remedy was complete at law. But he recognized the jurisdiction and the propriety of its exercise, when there were any special circumstances which made the remedy at law ineffectual or incomplete.

In *Morse v. Hovey*, 9 Paige, 197, on dismissing the bill, the chancellor affirms the decision in *Perrine v. Striker*, and expounds it more fully, thus: "The legislature did not intend to transfer to this court concurrent jurisdiction with courts of law in every case

of a usurious contract; but merely to give to this court the power to exercise its jurisdiction in those cases where it was necessary to aid the defense of usury; or to remove *usurious securities which were a cloud upon the complainant's title* to real property, or which might be used at law to his injury in such a manner that he could not interpose a legal defense to a suit on them in a court of law. Here the note is *negotiable*, so that it may be sued in the name of a third person; and if the bill had contained the allegation that the usury could only be proved by the oath of the defendant, it might possibly have presented a case for the interference of this court."

Conceding that this relaxation of the stringent and imperative language of the statute is reasonable, no construction of the statute has gone further.

Accordingly, bills by borrowers to remove usurious securities, which are a cloud upon the complainant's title to real property, have uniformly been entertained. (See *Cole v. Savage*, 10 Paige, 583, questioned, without impeaching the general doctrine, in *Post v. Bank of Utica*, 7 Hill, 391; *Peters v. Mortimer*, 4 Edw. Ch. 279; *Pearsall v. Kingsland*, 3 *id.* 195; *Dry-Dock Company v. American Life Insurance and Trust Company*, 3 Comst. 361; *Schermerhorn v. Talman*, 14 N. Y. 93; *Manice v. Dry-Dock Company*, 3 Edw. 143.)

It is no answer to such a bill that the mortgagor has a good defense to a bill for the foreclosure of the mortgage. It is an apparent incumbrance on the land. Its invalidity depends upon extrinsic facts. The doctrine of *Cox v. Clift*, 2 N. Y. 123, cited by the appellant, that the complainant has a perfect legal defense against it (when a right under it is asserted), "written down in the title-deed," has no application to it; and *Ward v. Dewey*, 16 N. Y. 519, was decided on like grounds. The mortgage is an impediment to a sale of the land for its value. The mortgagor is not bound to wait until the mortgagee attempts a foreclosure, not only for these reasons, but because in the meantime it may become impossible to prove his defense. If this be so, then, if the lands mortgaged were situated in this State, the mortgage in question was wholly void, and there is sufficient ground for invoking the interposition of the court to decree that such a mortgage be surrendered and cancelled or discharged. Whether it should be so discharged without the payment of that portion of the debt which has not been adjudged to be usurious, and which, for the purposes of this appeal, is to be deemed both legally and equitably due, will be presently considered.

Second, how, then, is the question affected by the circumstance that the mortgaged premises are situated in the State of Ohio, where the mortgage was executed?

The mere circumstance that the land is in another State can, *the person. That utge was to be governed by law of N.Y. as was made to be performed in N.Y. Rife. law says that O.K. — But wasn't made in N.Y. but was made in Ohio in acc. with a court made in N.Y. : so the preceding Equit. utge was made in N.Y.*

No adequate remedy at law.

It held that as Equity, it had jurisdiction of

upon no principle that I can discover, furnish a reason for denying the jurisdiction of our courts, or for questioning the propriety of its exercise.¹

*Statute only
prohib. making
him pay him
fruit of usury
claim, not
other non-
usurious
claims.*

Third, does it follow that the decree in this action, so far as it directed the surrender and discharge of the mortgage, was warranted by well-established rules of equity applicable to the subject?

It is familiar doctrine in courts of equity that "he who seeks equity must do equity," and without that the court of equity will not extend its arm for the relief of the suitor. If he can protect himself, either in whole or in part at law, if he can defend when assailed, very well; he can decline any concession of the equitable rights of the adverse claimant and stand upon his legal position, it may be safe, or it may be in peril, but if he invoke equitable interposition he must come with clean hands and prepared to do whatever in the judgment of equity is fair and equitable to his adversary; else, the court will not entertain him, but will answer, "Stand upon your legal rights, or come here and perform the just condition of equitable relief."

It cannot be doubted, therefore, that when a party comes into a court of equity to remove a cloud upon the title to his land, he must do whatever it is equitable that he should do, before the court will interfere. In that respect he stands in no other or better condition than he who comes to compel the specific performance of a contract to convey: he must come prepared to pay and perform all that by the conditions of the contract he was bound to pay or perform,—or than he who comes to set aside a conveyance obtained from him by fraud: he must come prepared to restore all that he has received as the consideration of such conveyance.

*Usury rule
as to doing
eg. in usury
cases.*

And, on precisely the same ground, it was the well-settled rule of courts of equity that he who came into that court to set aside a conveyance or other security as void, because given to secure a usurious loan, must come prepared to pay so much as he had in fact received. He might stand on his legal rights and defend any and every endeavor to compel him to pay, but if he invoked the aid of a court of equity to give him affirmative relief that court recognized his equitable obligation to refund what he had received (*Rogers v. Rathbun*, 1 Johns. Ch. 367; *Tupper v. Powell*, id. 439; *Fanning v. Dunham*, 5 id. 122, 137; *Morgan v. Schermerhorn*, 1 Paige, 544; *Fulton Bank v. Beach*, id. 429; s. c., 3 Wend. 573; *Taylor et ux. v. Bell et al.*, 2 Vern. 170; *Whitman v. Francis*, 8 Price, 616).

On what ground is the plaintiff in this case entitled to have his mortgage set aside without qualification or condition?

¹The discussion of this point is omitted.

The notes which he had given to secure a usurious debt are declared void, and ordered given up to be cancelled. He cannot be prosecuted upon his mortgage in any form in this State, because by law it is void. If he has need of further equitable interference, it is because the mortgage is an apparent lien, a cloud upon the title to his lands, and he should be relieved therefrom. *by the At.*

Why, then, if he asks further equitable relief, and invokes the further interposition of a court of equity therefor, should he not do equity? Why should he not pay to the defendants what he in fact received?

The answer, and the only answer which is or can be suggested, is that our statute declares (Laws of 1837, c. 430, § 4), that whenever any borrower of money, goods or things in action, shall file a bill in chancery for relief or discovery, or both, against any violation of the provisions of the title of the Statutes, concerning the interest of money, "or of this act, it shall not be necessary for him to pay, or offer to pay, any interest or *principal on the sum or thing loaned*, nor shall any court of chancery require or compel the payment or deposit of *the principal sum or interest*, or any portion thereof, as a condition of granting relief, or compelling or discovering to the borrower, in any case, *usurious loans* forbidden by the said title or this act." This section of the act of 1837 was passed to extend the previous title, so that it should embrace cases in which the court was applied to for discovery, as well as cases in which relief alone was sought, and to relieve him from paying any part of the principal or interest in either case, and it should therefore be read and construed in connection with such previous law, which is as follows (1 Rev. Stat., p. 772, § 8): "Whenever any borrower of any money, goods or things in action, shall file a bill in chancery for a discovery of *the money, goods or things in action taken or received in violation of either of the foregoing provisions*, it shall not be necessary for him to pay, or offer to pay, any *interest* whatever on *the sum or thing loaned*, nor shall any court of equity require or compel the payment or deposit of *the principal* or any part thereof, as a condition of granting relief to the borrower in any case of a usurious loan, forbidden by this chapter." (See *Livingston v. Harris*, 3 Paige, 528; same case on appeal, 11 Wend. 324; see the history of this legislation in *Post v. Bank of Utica*, 2 Comst. 391, *et seq.*)

What in these statutes is the principal sum or interest which the borrower shall not be required to pay? Is it not the "usurious loan" and the interest thereon? Is it not *the* money, goods or things in action, taken or received in violation of the provisions of the act? Most clearly that, and only that. It does not contemplate, it is true, the existence of any other equitable condition,

but it by no means requires that any other condition should be waived.

The subject dealt with is a loan upon usury; it designs that there shall be no means, direct or indirect, in which the payment of such a loan, or any interest thereon, shall be compelled either by a court of law or equity. And relief against such payment accomplishes the end, so far as this statute directs relief to be given.

Hence the discovery spoken of, and authorized by the statute, is a discovery of *the money*, etc., taken or *received* in violation of the statute, and not money which, not being so received, the borrower is bound both at law and equity to repay. And it is *the principal* or interest on *the* sum loaned, i. e., loaned in violation of the statute, the payment of which cannot be required as a condition of relief.

It follows that where a contract or obligation is given for two or more separate and independent things or objects, having no connection with each other, and one of those objects is the security of a usurious debt, although the contract or obligation is altogether void for reasons above given, and no action at law or elsewhere could be maintained thereon, nevertheless, if the party comes into a court of equity to ask that it be surrendered, all that the statutes of usury have done affecting the complainant's right to relief, is to forbid that any payment on account of such debt shall be made a condition of relief. As to other conditions, the statute is silent, and the court is left to administer relief upon those principles which govern the subject generally.

When, therefore, the plaintiff asks that a mortgage be cancelled as a cloud upon the title to his lands, and that a court of equity shall so direct, in virtue of its power and its disposition to enforce his equitable rights, the court may not require that he pay a usurious debt, or any part thereof, or any interest thereon, but it may require the performance of any other duty which is just to the adverse party, unembarrassed by the statutes in question.

In equity, the mortgagor in such case stands, in reference to debts not usurious secured by the mortgage, in the same attitude as a complainant seeking to redeem. He must pay what at law and in equity he owes. Nor is this any departure from the doctrine already stated, that the mortgage, being void in part, because given to secure a usurious debt, is void altogether.

Upon that doctrine, the plaintiff, if he see fit, may rely, and on that ground he may, if he can, defend himself and the title to his lands whenever and wherever assailed, but if he asks affirmative action and interference from a court of equity to set aside the mortgage and adjudge its surrender, he must do equity by paying his just debt, not impeached for usury.

(1) Idea that executory contracts will not be enforced. The party Compounding is at least as much in fault as the party paying.

(2) Whether Executed shd be enforced depends on whether they are in pari delicto. ~~might be~~ ~~that~~ ~~are~~ ~~in~~ ~~pari~~ ~~delicto~~ ~~x~~ ~~to~~ ~~that~~ ~~partly~~ ~~right~~. True father or mother is under Compulsion to save child, but other party often under Compulsion to get his money. But latter is just the sort of act that law is against - obtaining money by Compounding. So may be argued that parents paying in better position & shd be relieved. That idea of Courts that Relief has more often been granted in Equity but sometimes at law. But this mainly because only Equity has jurisdiction to order Cancellation of instruments. Prob. better to hold are in pari delicto.

(3) If in pari delicto what is effect on a wage? Is that an Executed or Executory transaction? If this had been an unconditional deed of the property no doubt the case would be right. Of course Court could hold that would not even protect title of wrong. doer: wd ~~but~~ simply let them work it out the best they could. But that wd perhaps lead to strife for possession by force; and, generally, to deny resort to Courts to enforce titles that parties really wd be unfortunate. So best rule

no doing Eq. by plat required as he or she got nothing for the wage. If law added getting wage and he good as if that or else plat. and have to relieve it.

The most that the court below should have done, was to adjudge that so much of the apparent debt as was secured by the four notes dated in July, 1854, proved and adjudged (by the decree as modified by the General Term of the Supreme Court) to be usurious, was void; that the said notes be surrendered to be cancelled, and that the defendants be enjoined against the prosecution of any suit upon those four notes.

The judgment should be modified to conform to these views without costs to either party on the appeal, and the judgment rendered at the Special Term, so far as it adjudged or decreed the surrender or discharge of the mortgage should be reversed, and so far as it awarded costs to the plaintiff, should be further reversed and modified so that neither party recover costs of the other in this action.

All the judges concurring,

Judgment affirmed, with modification.

Held that a mortgage given to secure 1000 dollars for father of accused gave not procuring a crime in an executed prom. RAGUET v. ROLL.

action a title passed and mortgage can enforce it by Ejectment. SUPREME COURT OF OHIO, 1836.

(7 Ohio Rep. 70 [429].)

This was an action of ejectment for a lot of land in the city of Cincinnati. On the trial, the plaintiff gave in evidence two mortgages executed by the defendant to him, for the same lot, one dated 16th October, 1826, the other the 20th October of the same year; each to secure the payment of 500 dollars. The defendant, on his part, adduced evidence to show that these deeds of mortgage were given to secure the payment of 1000 dollars, in consideration of the plaintiff's agreeing not to prosecute the son of the defendant for a theft, with which he had charged him.

GRIMKE, J. delivered the opinion of the court.

This was an ejectment on a mortgage executed by the defendant to the lessor of the plaintiff, conditioned for the payment of five hundred dollars. The defense was, that although this was the consideration expressed in the deed, yet, that the real consideration was an agreement on the part of the plaintiff not to prosecute the son of the defendant for a theft, and that the mortgage was given to secure the payment of one thousand dollars, as a reward for that purpose. In *Raguet v. Roll*, ante, p. 269, which was a *scire facias* on the same mortgage, it was held that this defense might be set up for the purpose of avoiding the payment of the money; and it is

Scire facias was then a method of foreclosure in Ohio. So foreclosure forbidden.

(now supposed that it will be equally effectual in bar of the action of ejectment. In the act under which the *scire facias* was instituted, it is provided that the defendant may plead any plea which would be good in avoidance of the land or money; so that the principles decided in the former case do not necessarily furnish a governing rule for the determination of this. The distinction between an executed and executory contract, where the consideration is unlawful, is a very plain one. In the former case, the Court will not annul; in the latter, they will not enforce. And this course, so totally opposite in the two cases, is intended to be subservient to the same end, the prevention of an immoral act. As long as the agreement continues executory, there is an incentive to the commission of the deed; but when it is executed, no further motive of this kind exists, since the estate has already vested or the money actually been paid. It may be supposed, however, that although a deed operates an actual transfer of the title to land, yet, if it is necessary to institute an action in order to recover possession, the Court will not enforce the right of recovery; in other words, that the principle *in pari delicto, etc.*, comes in conflict with the other principle to which I have referred, and that it necessarily affords the governing rule of determination. Where two apparently opposite principles have been established, the presumption is that they are both intended to have effect, and that the one shall not annul or neutralize the operation of the other. The rule *in pari delicto, etc.*, then, will be found to be universally applicable to executory agreements only. Thus in *Hawes v. Leader*, Cro. Jac. 270, the intestate of the defendant granted by deed to the plaintiff all his goods; the real purpose was to defraud creditors; the grantee brought an action to recover them, and obtained judgment. So in *Starke's Ex. v. Littlepage*, 4 Randolph, 368, which was an action of detinue to recover personal property transferred by a fraudulent bill of sale by the defendant to the plaintiff's intestate, the contract was enforced, and the plaintiff recovered. The rule, then, does not apply when the policy of the law requires that a fraudulent or vicious conveyance should be enforced; and such is declared to be the law by Coke, in his "Commentary on Littleton," and by Powell, in his "Treatise on Contracts." But there are exceptions to the rule *in pari delicto, etc.*, even in its application to executory agreements. *Watts v. Brooks*, 3 Ves. 612, is an instance of this, where the plaintiff and defendant, having entered into a contract to be jointly concerned in ship insurances, in violation of the Stat. 6 G. 1st, although the Court would not execute the contract, it would not exclude the result of it in decreeing a general account. And in *Osborne v. Williams*, 18 Ves. 379, the exception was pushed still farther; it was held that the rule, "*in pari delicto melior est conditio possidentis*," "preventing

Not any
use in this pt.

ditto

is to say that title has passed & since Ct
will not put it back it will protect it
where it is. Of course, might say will
protect title which ~~utge~~^{grantee} has gotten, but
will not give him pos. vs. ~~utge~~^{grantor} as he
has not yet gotten that. But title ex-
tends one to possession. If Ct will not
give ~~utge~~^{grantee} pos. then title is in one &
pos in another. Neither can sell.
Will lead to compromise or force.
Better for Court to protect grantee &
give pos.

Seems ~~some thing~~^{above} can be said
as to a ~~utge~~ in a state where title
passes. On other hand ~~utge~~ may be
distinguished on gnd that it is made
to secure debt & if debt does not ex-
ist because of illegality - then ~~utge~~
falls also. Trouble with this arg. is
that illegality does not allow of tech-
nical arguments to determine its
result. Contract may be binding
on one party & not on other. So
we seem here, debt may fail for
illegality - yet ~~utge~~ be held good
if that best policy. So seems that
usual rule that executed transactions
are valid where parties are in fair
debts may be applied. In Ohio ~~utge~~
possession title so Ct perhaps right in
holding that is executed, ~~utge~~ has
title, & can recover pos. In Pa.
, where title also passes, the Ct held
that ~~utge~~ was totally void & so no
title passed. Did not say why void.
Pos. on gnd that secures an illegal so

and that mortgage Executory is void. Almost no authority on exact pt of case: i.e. when mortgage treated as passing title &? is when the mortgagee can recover for.

Our case wd be decided other way

- (1) In states where parties are held not to be in pari delicto. There, of course, mortgagee has no sto. But if will not secure. Note 224. ^{Usury, rule applied.}
- (2) In states where mortgage held void because secures no debt & yet was intended to. Cases contrary to our case come here except for case.
- (3) In states where mortgage held executory. No passing title.

Then take states where mortgage held only a lien. ^{Suggestions} ~~Rever~~ ~~should~~ ^{should} follow.

(a) The lien is a legal lien & executed. Whether an executed transaction passes full title, partial or limited title, or a lien seems immaterial. So far as it has passed title or lien it is executed. (b) Arg. that lien fails because no debt is secured. Since illegality is reason for debt failing that arg. is not strong. But (c) since in lien states mortgagee is not entitled to sue until foreclosure our case wd not really arise. Whether mortgagee can foreclose is considered later. He can't foreclose & so never wd get for.

If (2) above is adopted, it is probably right of authority, then title shd be held to be in mortgagee & securities shd be cancelled. That no doubt wd be done.

suit," is not universal; and a direct decree was made in favor of the plaintiff, although the agreement was a fraud on the post-office.

If the deed in this instance were an absolute conveyance, there could be no doubt, then, of the right of the plaintiff to recover. The real difficulty arises out of the double character of the instrument, which is evidence of a debt hereafter to be paid, and at the same time, operates an actual transfer of the land to the mortgagee. Although a strong disposition existed once to treat a mortgage as a mere chose in action, and although individual judges were heard to declare that the money was the principal, and the land only the incident, and that whatever would carry the money, would convey the land; yet such is not now supposed to be the law. A mortgage is in reality a conditional fee, which is as large an estate as a fee simple, though it may not be so durable. And the case comes then within the principle that when a conveyance has actually been executed on an unlawful consideration, the Court will not merely not annul it, they will even permit it to be enforced. The cases put by elementary writers are all of them conveyances *on condition*. Thus, if a feoffment be made to one man, on condition that he shall kill another, it is said to be good and unavoidable. But in the case of a mortgage, it may be said that there are two conditions, one to be performed by the grantor, the other by the grantee; the former is to pay the one thousand dollars, the latter is to suppress a criminal prosecution. This is the apparent, but it is not the real nature of the transaction; and it is in consequence of this false appearance, that the question seems to be surrounded with an unusual degree of difficulty. A mortgage is in reality an actual payment of the debt, as well as an actual transfer of the land; although, in consequence of the land being sometimes greater in value than the debt, an equity was supposed to arise in favor of the mortgagor, which was called his right of redemption, and which is now extended to every case of a conveyance by way of mortgage. It is a mere equity, then, an equity which is not recognized by a court of law, but only by a court of chancery; an equity which, proceeding on the ground that the debt has already been paid in one way, enables the grantor, on certain terms, to pay it in another. There is, then, no real difficulty in the case, however intricate the questions presented may at first sight appear to be. The testimony offered to impeach the deed was improperly admitted, and there must therefore be a new trial.¹

i.e. is executed
B. can be
enforced.

Wholly wrong
notion in
this means
after default

Mean is
wholly sus-
tained & s. x. d.
don't count.

¹ Compare *Williams v. Engelbrecht*, 37 Oh. St. 383 (1881), accord; *Pearce v. Wilson*, 111 Pa. St. 14 (1885), contra.

given by wife. No dis-
of whether executed
or not. Goes on ground
that wife void.

Pollins on
case.

nonsense.

*Father of accused gave
utge.*

*Roll utged to Raguet to stop proce-
dure of Roll's son. Raguet assigns
everything to McMicken for benefit
of Raguet's Cords. Roll utges to file*
COWLES v. RAGUET. In 1839 this utge was proce-

SUPREME COURT OF OHIO, 1846. by *filed* he brought the
(14 Ohio Rep. 38.) *property. Raguet brought Eject-
ment on utge 17th Feb. Bill*

This is a Bill in Chancery, reserved in Hamilton County, and by *filed* to re-
comes before the Court by appeal from the Superior Court of Cin- *decide from*
cinnati. *utge to Ra-*

The original bill was filed on the 17th of February, 1841, in *quest. Other*
which the complainant states that in the year 1839, he purchased *deft. an*
a certain lot in Cincinnati, under a decree of said Superior Court, *Cords of Ra-*
upon a bill by him filed, to foreclose a mortgage on the same lot, *quest. P'ty*
executed by Peter Roll, one of the defendants, in 1835. That the *still own*
money by him bid for said lot exceeded, by about fifteen hundred *1500 of amt*
dollars, the amount of the decree. That this surplus is claimed by *he bid on per-*
Roll the mortgagor, by the defendant McMicken, in consequence of *chase of land*
an assignment to him of an older mortgage on the same land, given *held that if*
by Roll to the defendant Raguet, and by the other defendants claim- *filed and re-*
ing to be judgment creditors of Raguet, and, as such, to have a *decide he*
lien upon the land mortgaged. *must pay*
amt of utge.

The prayer of the bill is, that the defendants may be com- *nothing else.*
pelled to interplead; and in the event that the court shall be of *9th in each.*
opinion that the mortgage of Raguet is a lien upon the land, then
that the complainant may be permitted to redeem.

The facts of the case as they appear from the bill, answers, *deft here*
exhibits and testimony, are substantially these: In the summer *seems to*
of 1826, the defendant made to Raguet two promissory notes for *mean Roll*
five hundred dollars each, and, to secure the payment, executed two *ing the pay-*
mortgages on the premises in controversy. The consideration for *ment. That*
these notes is said to have been, in part at least, an engagement, *could for*
on the part of Raguet, not to prosecute the son of Roll, who had *prom to pay*
been by him accused of larceny. *was illegal*
is in an at-

On the 27th of November, 1832, Raguet, being in failing circum- *utge*
stances, made a general assignment to the defendant McMicken, *having title*
for the use and benefit of his creditors. In this assignment was in- *despite the*
cluded choses in action, as well as all mortgages or judgments, and *illegality*
the "claim against Peter Roll," then in controversy. *by means*

Afterwards Raguet commenced an action of ejectment for the lot *of utge deed must be*
in controversy, upon his mortgage, and at the December term of *found by cond in deed for redemption. Utge*
this Court, 1836, a judgment was rendered in his favor. Mc- *can't get back land with out paying money. Pre-*
Micken as the assignee of Raguet, subsequently obtained posses- *vious case giving utge pro. by Ejectment*
sion of a portion of the mortgaged premises, and enjoyed the same *really decided that. See also 247 &*
for some twelve or eighteen months, or more.

i.e. Roll

Found no other authority in this pt. What can be said on principle?

Of course if

(1) mtge. will be cancelled then? cd not arise. Parties are acc. to that they not in pari delicto & mtgor got nothing except Compounding of felony he has no Equity to do in order to get Cancellation.

(2) If mtge held void then redemption impossible. To a bill to declare it void no requirement of payment cd be made for reasons under (1).

But if held valid as in Ohio then? is can mtgor redeem. Depends on whether estate will be deemed Conditional. That depends on whether cond so illegal that deed will be declared absolute. Seems Ct. is right.

To hold Contra wd be giving mtgee more than he got by mtge. A cond. Estate was executed in him but not an absolute one. As Ct says payment of money, too, is not illegal.

But cd be argued that while estate is conditional parties will be left to assert their rights out of Court or at law. Mtgor by paying on day will get his property back, but not otherwise. But this seems wrong. Mtgee now ans. made with idea of Equity relation in view. The estate that is

executed in the mtgee is not merely an estate defeasible at ^{the law day} ~~the law day~~, but an estate defeasible any time before foreclosure. This latter is the lesser estate. The transaction shd not be treated as executed to any greater extent than it really is.

The defendants Wood and Abbot, at the February term of the Court of Common Pleas of Hamilton County, 1833, recovered a judgment against Raguet, which was levied upon the interest of Raguet in the mortgaged premises on the 24th of April, 1840.

The defendants, Brown, Chase and Company, recovered a like judgment against Raguet at the August term of the same Court, 1833, and took out execution, which was levied on the same interest, on the 27th of April, 1840.

In 1835, Roll executed a mortgage on the same premises to the complainant Cowles, which was subsequently foreclosed, and the premises sold as stated in the bill.

In February, 1841, the property was also sold on a *vendi*, issued upon the judgment of Brown, Chase & Co., and sale confirmed.

HITCHCOCK, J. The facts and circumstances connected with this case are not new to the Court, at least those which may be considered as the leading ones. They have been repeatedly presented to us, have been as often passed upon, but the controversy does not as yet seem to have been closed.

Before proceeding to the consideration of the particular questions arising in this case, it may be well to ascertain what has been the previous action of the Court. Previous to the December term, 1831, Raguet commenced a suit against Roll, upon the notes secured by the mortgage, referred to in the statement of the case. This suit was commenced in the Court of Common Pleas of Hamilton County. The defendant pleaded in bar, that before and at the time of the commencement, Charles Roll, the son of the defendant, was suspected and accused by Raguet of having stolen his goods and chattels in Cincinnati; that Raguet was about to institute a criminal prosecution against Charles, for the theft, and that the consideration for which the note was given, was a promise or engagement on the part of Raguet that he would refrain and desist from instituting such criminal prosecution. To this plea there was a general demurrer. The Court of Common Pleas sustained the demurrer and rendered a judgment against Roll for the amount of the notes.

To reverse this judgment, a writ of error was sued out, and the case came on for hearing at the aforesaid December term of this Court, 1831. By the decision of the Court, the judgment of the Court of Common Pleas was reversed, upon the principle that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them. If the agreement be executed, the Court will not rescind it; if executory, the Court will not aid in its execution. This case is reported at length, 5 Ohio Rep. 400.

Raguet then commenced a suit, by *scire facias*, upon the mort-

Raguet's
note was
in 1826

Held cd
not rescind
on note.

Held cd
not fore-
close.

gage, under the law then in force, to enforce payment by the sale of the mortgaged premises. A plea substantially the same as that interposed in the action upon the notes, was filed; and, upon trial, the Jury found the facts as stated in the plea. A motion was made for a new trial, which the Court overruled, sustaining the decision in the former case (7 Ohio Rep. 76, 1).

*Cd recur
in 2d. W.
preceding
cas.*

Raguet then commenced an action of ejectment upon the mortgage, and this case came before this Court at the December term, 1836. Roll attempted to set up the same defense as in the former cases, but it was not allowed by the Court; the Court holding that a mortgage was not an executory, but an executed contract; and that, as the Court would not aid in carrying into effect a contract of the former character, so neither would it aid in avoiding or rescinding a contract of the latter character (7 Ohio Rep. 70, p. 2).

What then is the situation, at this time, of the original parties to this contract? The fee of the land is vested in Raguet or those claiming under him; and, by execution upon the judgment in ejectment, he may at any moment be put into the possession. This judgment cannot be enjoined, because, by ordering an injunction, the Court would be doing, indirectly, what it has refused to do directly. It would in effect amount to the rescission by a judicial tribunal of an executed contract, the consideration of which was against public policy, and which would be contrary to the opinion of the Court, as expressed in the case already cited from 4 Ohio Reports.

Now what is the case before the Court? The interest of Roll in the lot of ground, was transferred to the complainant by judicial sale in 1839. He has in his hands about fifteen hundred dollars, which belongs to Roll, unless the same is necessary to satisfy prior incumbrances. The complainant prays the Court, in the event the mortgage of Raguet is held to be an incumbrance upon the land, to allow him to redeem; and he prays further that the funds now in his hands may be applied to that purpose.

The Court have already decided, not only that the mortgage is an incumbrance, but have sustained an action of ejectment in favor of the mortgagee, for the recovery of the possession of the mortgaged premises; and, as already remarked, the mortgagee may, at any moment, through the instrumentality of the proper writ of execution, acquire the possession. The legal title is vested in the mortgagee; but the deed under which he claims, and by virtue of which the title is vested in him, is subject to a condition that the same shall be void, upon the payment of a certain sum of money by the mortgagor. Now there is nothing in this condition requiring of the mortgagor to perform an impossible, immoral, or illegal act. If such were the fact, the condition would be void and the

deed absolute. But it is not so. It is a simple condition for the payment of money.

But it may be said that the original consideration for the promise to pay this money was an illegal consideration. Be it so. Still the person to whom the promise was made, cannot be permitted to set this up to destroy the effect of a condition inserted in the deed, executed to secure the performance of that promise. When the mortgagee was prosecuting an ejectment upon his deed, we would not and did not permit the mortgagor to avoid that deed by proving that the consideration was illegal. And now, when the mortgagor comes to redeem, shall we permit the mortgagee to defeat that condition, by proving that the consideration for the promise set forth therein, was illegal? This would not seem to comport with even-handed justice. It would have been honest in Roll to have performed this condition by the payment of the money. It would be honest in the complainant to pay it; and we think he has a right to do it, and thereby redeem the land from the effect of the mortgage.

But, in this case, the mortgagee does not object to the redemption. The objection comes, so far as there is any, from the mortgagor himself. He claims to be discharged from the performance of the condition, and still to retain the land. He seeks to induce this Court to do, indirectly, what it would not do directly. In this aspect of the case, it is nothing more nor less than an attempt to obtain an injunction against the judgment in ejectment. This cannot be done. The mortgagor has conveyed this land by a deed duly executed, subject nevertheless to a condition. If he would retain the land, he must perform that condition.

But it is insisted by the counsel of Roll, that, admitting the right of the complainant to redeem, still, that the surplus money in his hands cannot be applied to this object, because, as they say, he purchased the land subject to the mortgage of Raguet. The fact appears to be this: in the decree in the case of Cowles against Roll and others, under which the complainant purchased, the Court, although they ordered a sale, did not undertake to decide the validity of Raguet's mortgage. Of course that sale must be subject to this incumbrance. But still the land could not be, and was not sold for any less sum. The law required that it should be sold for at least two-thirds of the appraised value. It was so sold. The land itself for its full value; not the land reduced in price in consequence of Raguet's mortgage. Under these circumstances, it seems equitable to the Court that this surplus should be applied first to remove the incumbrance of the mortgage now in controversy. If anything remains, it must be paid to Roll.

The next question is, as to which of the defendants is entitled

Pt.

←
Ordinary
result and
be other
way.

to the money to be paid for the redemption of this mortgage. McMicken claims as the assignee of Raguet, by deed executed in 1832; Wood and Abbott, and Brown, Chase & Co., as judgment creditors of Raguet, under judgments rendered in 1833, and levied on his interest in the mortgage premises in 1840.

From a careful examination of the deed of assignment, we are clearly of opinion that the interest of Raguet, by that deed, was vested in McMicken; and such being the opinion of the Court, it is unnecessary to enquire as to the claims of the other defendants.

Action to foreclose mortgages. Deft represent mortgages - one of depts wife of mortgagee also signed mortgage.

Plff is executor of parties. McQUADE v. ROSECRANS.
Deft allege that mortgage was given to defendant. SUPREME COURT OF OHIO, 1881.
Circuit Ct Excluded Ex. of (36 Oh. St. 442.)

Exec. of Thinpoint the mortgage

this. Held Error to the District Court of Scioto County.

Snor. Crime The action below was brought by Sylvester H. Rosecrans against ant makes Elizabeth McQuade and John McQuade, administrator de bonis non of Hugh Reiley, to foreclose two mortgages executed by said Reiley and his wife Elizabeth, now the plaintiff Elizabeth McQuade, to secure the payment of certain promissory notes, amounting in the aggregate to \$1600, executed by Hugh Reiley and delivered to Emanuel Thinpoint, the defendant's testator, in the years 1857 and 1858.

plff in error

deft in error

of Conaid Said Elizabeth was sole heir of the said Hugh Reiley. The answer averred, among other things, that at the time said Hugh Reiley executed the said notes and mortgages, he was in embarrassed circumstances, and involved in debt beyond his means to pay, without resort to the real estate mortgaged, and that said mortgages were executed by said Reiley and received by said Thinpoint in double the amount actually loaned, for the purpose of placing the property mortgaged beyond the reach of the creditors of Reiley. The reply admitted that the consideration of said notes secured by said mortgages to the amount of \$800 was never paid to said Reiley by said Thinpoint, but was a trust fund created by said Reiley in favor of said Elizabeth, who after the death of said Hugh Reiley and before said suit was commenced, intermarried with John McQuade. The reply denied that said conveyances were made with intent to defraud the creditors of said Hugh Reiley.

Answer

Mtge in Ex. is not executed with intent to defraud On the trial in the district court, to which the cause had been appealed, the plaintiffs in error called as a witness Cornelius McCoy, who stated that he was acquainted with Hugh Reiley in his lifetime, the former husband of the said Elizabeth McQuade, and counsel for the plaintiffs in error. The court held that the plaintiffs in error were not entitled to a verdict, and that the defendants were entitled to a verdict.

Reply

plff in error must seek the Ct. when parties are in pari delicto any one may set up the illegality.

unsatisfactory opinion because does not deal with last two cases, both in same Ct & prin to our case. Can this case be distinguished from action of ejectment? If equity can have ejectment, why can't he have ~~foreclosure~~ foreclosure? (i) Court says in equity mortgage is purely executory. That can't be maintained. Would equity refuse foreclosure because mortgage given as a gift? ^{and equity} Executory merely that result would follow. Would equity require a suit by mortgagee for possession on ground that tho' at law mortgage is executed yet in equity is executory & so must not be enforced? Clearly not. So mortgage is as much executed in one Court as the other. That in equity a mortgage is often said to be a lien makes no diff. It is an executed lien. And is not for all purposes merely a lien in equity. (b) Is there any other difference? (i) Refusing foreclosure will not lead to strife as refusing possession might. (ii) The right to redeem will be barred by St. Lien in time & result will be that mortgagee will thus eventually get perfect title. (iii) In usual case foreclosure involves a determination of the amt due & a T. for a sale of property to pay it and a personal T. for the deficiency. So if usual procedure followed, wd be enforcing not only the mortgage but the debt. That would not do. The foreclosure cd only be a strict foreclosure w/o sale or anyhow must be no deficiency judgment.

Very little authority, but what there is indicates that foreclosure wd not be

allowed. Perhaps no great objection can be taken to this.

Our case says mortgage is void. Of course that is not Ohio law as prior cases show. It does pass title - it is treated as executed. despite the illegality. But the arg. that mortgage is illegal & ∴ void & so foreclosure is impossible is the one. Courts have mainly relied on. But also go on ground that parties in pari delicto will help neither.

Should also add that mortgage in fraud of creditors is not generally illegal but only voidable by defrauded creditors like other conveyances in fraud of creditors. Here Ct. made it illegal. In N.Y. Ct. have held it illegal.

Would eg. require redemption on ground that no need of redeeming a mortgage executory transaction & so of no effect when illegal? Ohio held not, & yet if executory when mortgagee sues why not executory when mortgagor sues? If really executory eg. add order cancellation & injunction all suits at law by mortgagee.

sel for defendants therein propounded to the witness the following question, viz.:

"What, if anything, do you know as to the pecuniary circumstances of Hugh Reiley, prior to his death?"

To which question the plaintiff, by his counsel, objected, and the court sustained said objection, and the witness was not permitted to answer said question.

Counsel for defendants then proposed and offered to prove by said witness, and other witnesses, that at the time of the execution of said notes and mortgages sued upon, the same were given for just double the amount of money actually loaned. That the said Hugh Reiley was being sued by various creditors and was in embarrassed circumstances and wholly insolvent, which facts were well known to both said Hugh Reiley and the said Emanuel Thinpoint, and that the object on the part of both said Reiley and Thinpoint in taking the notes and mortgages for double the amount loaned, was to cover up and protect said real estate so mortgaged from being levied on and sold in payment of the debts due to said creditors; that, in fact, the giving and taking of the said notes and mortgages did operate as a fraud on said creditors; but the court ruled that said evidence and each part thereof was incompetent; that the contract, as between the said Emanuel Thinpoint and Hugh Reiley must be regarded as executed, and that the defendant, Elizabeth Reiley, was not in a position to raise the question of fraud upon the creditors of the said Hugh Reiley, and therefore excluded the testimony offered. Judgment having been given for the plaintiff below, the exclusion of said testimony is here assigned as error.

BOYNTON, C. J. We think the court erred in excluding the evidence offered to show that the object of the mortgagor in giving the mortgages sued on to secure double the amount of money borrowed, and of the mortgagee in receiving the same, was to defraud the creditors of the mortgagor. Section 97 of the crimes act (1 S. & C. 429) makes it a penal offense, punishable by fine and imprisonment, for any person to make any grant or conveyance, with intent to defraud his creditors of their just demands.

The object of the testimony offered and rejected was to show that a part of the consideration of each of the notes the mortgages were given to secure was illegal, and consequently that the mortgages were void. If a part of the consideration of each note was illegal, the effect would be the same as if the entire consideration were illegal, and such effect would be to render the mortgages void. If any distinct note that either mortgage was given in part to secure, was not tainted with the fraudulent purpose to defraud the maker's creditors, no doubt equity would follow the law and enforce to that

extent the mortgage security; but where a part of the consideration, whether large or small, is affected with the fraud, the case falls within the operation of the principle stated and affirmed in *Widoe v. Webb*, 20 Ohio St. 431. Hence, the testimony offered was clearly competent, unless the view is correct which the district court seems to have taken, namely, that the contract evidenced by the mortgages was fully executed between the parties. That such is not the character of the contract in the view of a court of equity, is apparent from a moment's reflection. In equity a mortgage is but a chose in action, given to secure the performance of some act, usually the payment of money.

Where anything remains to be done to carry into effect the intention of the parties, and which can only be accomplished through the aid of a court of equity where one of the parties refuses to perform the stipulation which he has agreed to perform, the contract is executory. A mortgage being conditioned for the payment of a sum of money, or the performance of some other act, if the money is not paid or the act performed, and the equity of redemption is sought to be foreclosed, the active aid of a court of equity is required. The payment of the mortgage debt, or the performance of the condition, whatever it may be, can be secured in no other way.

And this aid is always, and uniformly, denied, when sought to enforce a contract the consideration of which is illegal. In such case the maxim applies, *in pari delicto potior est conditio defendentis*, not because the defendant's rights are superior to the plaintiff's, but coming into court with unclean hands it refuses to exercise its powers in his behalf. The case of *Raguet v. Roll*, 7 Ohio, 77, was a *scire facias* on a mortgage to charge lands with execution. The mortgage was given to secure the payment of the sum of \$500, the consideration of an agreement to suppress and prevent a criminal prosecution. The relief sought was denied, and expressly upon the ground that the consideration of the mortgage was tainted with illegality. That case, in principle, is not distinguishable from this, and is decisive of the question now under discussion. The remaining point is, that because Mrs. McQuade signed the mortgages, she cannot allege that the consideration of the same was illegal either in whole or in part. This question was settled in *Goudy v. Gebhart*, 1 Ohio St. 262, and was also directly involved in *Raguet v. Roll*. The rule is, that in so far as the contract is executory, the defendant, although *in pari delicto*, or any one acquiring an interest in the property affected by the contract sought to be enforced, may set up the illegality of its consideration in defense. No one is allowed to set up his own fraud or criminality to defeat an innocent party, but where both parties

Same pt really a lost case. Parties are
in pari delicto. Eg. refuse to purchase
the rug.

are *participes criminis*, the fraud may be set up and proved by either party, when the unexecuted portion of the contract is sought to be enforced against him.

Judgment reversed and cause remanded.

STILLMAN v. LOONEY. *Foreclosure of a mortgage may be defeated by showing cause was illegal.*

SUPREME COURT OF TENNESSEE, 1866. *Illegal because*

(3 Cold. 20.) *was for repayment of a loan which was made in Confederate notes.*

At the March Term, 1865, of the Common Law and Chancery Court at Memphis, plaintiff's bill was dismissed. Judge Smith, presiding. Complainant appealed.

SHACKELFORD, J., delivered the opinion of the Court.

This bill was filed on the Chancery side of the Common Law and Chancery Court at Memphis, to foreclose a mortgage executed by the defendant, on three lots in the City of Memphis, which had been duly registered to secure the payment of two notes, of \$2500 each, dated July 22, 1862, due in twelve and twenty-four months from date, payable at the Union Bank, indorsed by Stillman & Beach. The answer of the defendant and the proof shows the consideration for which the notes were executed was Confederate Treasury notes. The Chancellor dismissed the bill; from which the complainant has appealed.

It is a well-settled principle in executing contracts, if the consideration is illegal and against public policy, the Court would not lend its active aid to enforce it. No rule of law is more clearly defined and settled than this, in the American and English Jurisprudence (3 Head. 297 and 723; 6 Bing. 174; 10 Bing. 110). This Court held in the case of *Overall v. Wright, deceased*, at Nashville, December Term, 1865, in manuscript, that an agreement to credit a payment in Confederate Treasury notes, for which Mr. Wurtz had given his receipt, and on the trial sought to have credited on the note, was no payment; that Confederate Treasury notes were issued for an unlawful purpose, and in violation of the laws of the State and Constitution of the United States, and that all contracts founded upon them were illegal, and could not be enforced through the Courts. In the case of *Craig v. The State of Missouri*, the Supreme Court of the United States held a promissory note given for certificates issued at the Loan Office of Chariton, Missouri, payable to the State of Missouri, under the Act of the Legislature establishing Loan Offices, was void (4 Peters, 410), the Act being in conflict with the Constitution of the United States.

In the case under consideration, the notes were issued by an unlawful confederation of States, whose declared purpose was to overthrow the Constitution. The enforcement of all such contracts is against public policy. The party seeking the aid of the Court will be repelled. The defendant, not out of any favor to him, but because he is such, can allege and show the illegality of the contract. That being made apparent, the legal consequences follow.

There is no error in the decree of the Chancellor, and the same is affirmed.¹

McLAUGHLIN v. COSGROVE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1868.

(99 Mass. 4.)

Writ of entry by the heir of a mortgagor of land against the mortgagee in possession after foreclosure. In the Superior Court, on agreed facts which are stated in the opinion, Reed, J. directed a verdict for the tenant, and reported the case.

J. C. Kimball for the demandant.

T. H. Sweetser (G. Stevens with him) for the tenant.

CHAPMAN, J. The demandant admits that her ancestor, Daniel McLaughlin, gave the tenant two mortgages of the demanded premises; one dated April 25, 1855, and the other dated February 12, 1858; that the tenant entered for foreclosure on the 6th of March, 1863; and that the foreclosure was completed prior to the commencement of this action. But it appears that these mortgages were made to secure the payment of notes which were given in payment for intoxicating liquors illegally sold by the tenant to the mortgagor. By the statute then existing, these notes were void; and it is admitted that, if the mortgage had not been foreclosed, this action could not be maintained. For, as a security for a debt made illegal by statute, the mortgage could not be enforced against the demandant, who is the heir of the mortgagor. It is necessary, then, to consider the effect of the foreclosure.

A deed of mortgage conveys to the mortgagee the legal title to the land, subject to a condition. If the condition be performed according to its terms, the title of the mortgagee is thereby defeated. If not performed at the day, the legal estate remains in the mortgagee, and an equitable right to redeem by payment at a later day is all that remains in the mortgagor, unless he can show that the

¹ Accord, *Dresler v. Tyrrell*, 15 Nev. 114 (1880); *Peed v. McKee*, 42 Ia. 689 (1876).

?
This sentence
shows "not" should
be out.

After foreclosure & expiration of time to redeem, illegality cannot be relied on. Sale of liquor contrary to St.

This case is clearly right where parties are in pari delicto. In Mass. they have foreclosure by entry w.o. aid of Ct. Mtgor may redeem within 3 years after mtgee enters but if he does not do that mtgee has perfect title. That is what happened here. Now any- how the transaction is fully executed. Probably is executed before then.

Will foreclosure out of Ct be recognized when can't foreclose in Ct? Yes. It is that Ct will not aid mtgee, but if he can aid himself then O.K.

State went to 253 that can do. feat mtgee altogether where illegal shd not be law except where ~~if~~ mtgor not in pari delicto — prob is not law except there, but no certainty.

Representatives of the cases where parties to
compounding a felony are treated as in
pari delicto & so writge will not be or-
dered cancelled. Authority Centra prob-
ably fully as great as accord.

Does this case hold that writge was
executed - trans action? - This depends
on whether Equity and order recur-
res given up where parties in pari
delicto but trans action executory. Gen-
erally held that it will. So Ct holds
that writge is executed trans action. That
right. Only? as to case is whether
parties are really in pari delicto. Post
Case right as to that.

But mortgages contained a power of
sale. Suppose writge starts to sell
under his power, Could writgor get the
sale enjoined? Know no case on exact
point. In cases of usury sale has
been enjoined but these parties are not
in pari delicto.

consideration was illegal, in which case he may defeat the mortgage altogether. But if the grantee enters for breach of the condition, and keeps possession till the right to redeem is foreclosed, he then has an absolute title; and the value of the land is applied, by operation of law, to the payment of the debt secured by the mortgage.

In a case like the present, it is as if the mortgagor had purchased the liquors, and paid for them by an absolute conveyance of the land. If, then, the demandant can recover, it must be on the ground that the property given in payment for liquors illegally sold can be recovered back. But such is not the law. Payments made for intoxicating liquors in money, labor or personal property, may be recovered back (Gen. Sts. c. 86, § 61; *Walan v. Kerby*, ante, 1). But the statute does not extend to payments made in real estate. The demandant has lost her claim to the land by not bringing her action till after the mortgage was foreclosed.¹

Judgment for the tenant on the verdict.

Bills to have two note & mortgages cancelled because consideration was stippling prosecution. Held for deft. If pliffs were sued they could defend on illegality. The Ct will aid neither. It will not aid pliff. They were in pari delicto. Besides criminal

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1869. *overd amt Embezzled 18hd pay. again pliffs suit*
(101 Mass. 363.) *he injured as note are overdue & so purchaser not take subject to defenses. Mises wd be subject to same defenses.*

Two bills in equity to compel the surrender or cancellation of two overdue promissory notes, dated in 1861, and signed by the plaintiffs respectively, with Joseph Atwood, each note for the payment by the promisors, jointly and severally, to the order of the defendants, of \$1340, in equal semi-annual instalments of \$67, with interest; and of two mortgages of real estate, containing the usual power of sale clauses, given by the plaintiffs, respectively, to the defendants, to secure the payment of the notes. The ground on which the bills were sought to be maintained was, that the consideration of the notes and mortgages was a promise of the defendants to the plaintiffs, to forbear to prosecute Joseph Atwood, who was a bookkeeper in the employ of the defendants, for embezzling money of his employers; that therefore the instruments were null and void; but that, so long as they remained outstanding, they constituted a cloud on the title of the plaintiffs in the real estate, and might be used to the injury of the plaintiffs at some future time when evidence of the illegality of their consideration should be lost. The answers denied the plaintiffs' allegations con-

¹ Accord, *Sample v. Barnes*, 14 How. (U. S. Sup. Ct.) 70 (1852).

Sample was surety on an illegal sale of slaves. He let J. go to him. Since now he has to set aside. Held Court. If Cd have avoided trans action when sued yet now cannot as in pari delicto & deft has the Judgment.

cerning the consideration for the instruments, and alleged a lawful consideration therefor. Issue was joined on the answers, and the cases were reserved by Colt, J., on the bills, answers and evidence, for the determination of the full Court.

AMES, J. A note, given in consideration of a composition of felony, or of a promise not to prosecute for a crime of a lower degree than a felony, is illegal, and cannot be enforced by the promisee against the promisor. And it makes no difference that, of various elements making up the entire consideration, a part, and even the larger part, was legal and valid. If part of the consideration was illegal, the effect upon the note would be the same as if the whole were illegal. The plaintiffs insist that the notes referred to in their bills of complaint fall within this rule of law.

But it has also long been settled that the law will not aid either party to an illegal contract to enforce it against the other, neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever article of property he may have applied to such a purpose. The meaning of the familiar maxim, *in pari delicto potior est conditio defendentis*, is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action, founded on the illegal contract, in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts. In the somewhat quaint language of Lord Chief Justice Wilmut in *Collins v. Blantern*, 2 Wils. 350, "all writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul, o procul este, profani!*" In this respect the rule in equity is the same as at law. Equity follows the rule of the law, and will not interfere for the benefit of one such party against a *particeps criminis*. The suppression of illegal contracts is far more likely in general to be accomplished, by leaving the parties without remedy against each other. And so the modern doctrine is established, that relief is not granted where both parties are truly *in pari delicto* (1 Story Eq. § 298; *Claridge v. Hoare*, 14 Ves. 59).

There is no reason why equity should be able to grant relief upon principles different from those recognized in courts of law. If the plaintiffs were occupying the position of defendants, and if the cases before us were actions brought to recover the amount of the notes in question, they could avail themselves of the maxim

Afar, Oh! be ye afar, profani!

above referred to by way of defense. But they do not stand in that position. They are themselves invoking the aid of the court in its equity jurisdiction, to relieve them from a contract which they allege to be illegal. They are actors, or plaintiffs, and apparently are in a position in which the maxim in question can be invoked and relied upon on the other side. If the notes were founded on an illegal consideration, why should the court lend its process to aid one party to the illegality, rather than the other? What superior equities, in that view of the case, have these plaintiffs over the defendants? We see no such inequality in position, or abuse of advantages, as to entitle them to the aid of the court on the ground of public policy. If there has been a composition of a felony, or a suppression of a criminal prosecution, the plaintiffs were parties to it as well as the defendants, and it may perhaps be argued that the plaintiffs have had the benefit of the alleged corrupt agreement, and are merely seeking to be relieved from its inconveniences. They are seeking not to get back money paid under an illegal contract, but to recall notes and securities which they have given under such a contract, a distinction which is too slight to make much difference in the substantial equities of the case (*Worcester v. Eaton*, 11 Mass. 375).

We see no occasion for the interference of the court, as prayed for, upon any view of the case. If the bookkeeper embezzled the funds of his employers, he not only committed a crime, but he also incurred a debt. This debt he was legally and morally bound to pay, and the defendants had a right to make use of all lawful and proper means to enforce its payment or to obtain security. The rule of the common law, that all civil remedies in favor of a party injured by a felony are either merged in the higher offense against public justice, or suspended until after the termination of a criminal prosecution against the offender, is no part of the law of Massachusetts (*Boston & Worcester Railroad Co. v. Dana*, 1 Gray, 83). The fact that the debt grew out of a breach of trust, and had its origin in fraud and criminality, is not a reason, as a matter of law, for bestowing upon the debtor any peculiar privileges or exemptions. If the suppression of a criminal prosecution was one of the considerations for the contracts made and securities given by the plaintiffs, they can avail themselves of that fact as a defense in any suit at law against them upon such contracts. They are in no danger of losing the benefit of that defense in consequence of any transfer of the notes to a third person. Some of the instalments were overdue and unpaid, and for that reason no indorsee could so hold them as to deprive the plaintiffs of their defence. As to the exercise by the mortgagees of the power of sale given by the terms of the mortgages, it cannot be difficult for the plaintiffs to see

that any purchaser at such sale should be fully notified (if notice should be thought necessary) of all grounds of objection to the notes and mortgages, and of their intention to contest any title which such purchaser shall venture to buy at the sale. It is well settled that all defenses (except the statute of limitations) that can be made against the notes, can also be made against the mortgages (*Vinton v. King*, 4 Allen, 562).

Whether the evidence reported can be said to prove the alleged illegality in the contract is a question which we have not found it necessary to decide, or even to consider. In any view that can be taken of that question, the plaintiffs are not in a position to claim the equitable relief prayed for; and therefore, in each case, the

*Bill is dismissed, with costs for the defendants.*¹

*Sale of business by Peterson to deft. Articles were in-
ventoried & prices set opposite each. at end
116 \$ was added without saying why - perhaps
for good will. Acct was divided & notes &*

SHAW v. CARPENTER.

SUPREME COURT OF VERMONT. [IN CHANCERY.] 1881.

(54 Vt. 155.)

*articles were liquor id-
legally sold. Held note*
Petition to foreclose a mortgage. Heard on petition, answer, general replication, and the report of a special master, at the September term, 1880, Chittenden County, Taft, Chancellor. The court ordered, *pro forma*, that a decree of foreclosure be rendered against the defendants, for \$51.71.²

The opinion of the court was delivered by

ROYCE, Ch. J. This cause was heard upon the report of a special master appointed to ascertain and report the amount due on the mortgage described in the petition.

It appears from the report that on the 24th day of July, 1872, one Benjamin D. Peterson, who was then engaged in the business of bottling cider, soda, and mineral waters, at the city of Burlington, sold the good will of the business and all his stock—tools, bottles, machinery, and fixtures, then in use by him in said business, as specified in certain inventories, which were signed by the said Peterson, to the defendant Carpenter.

Upon said inventories the various articles sold were separately carried out, with a separate price for each item. The footings of the separate pages were brought forward upon the last page, where the aggregate correctly appeared of the sum \$3221.81. To this

¹ Accord, *Patterson v. Donner*, 48 Cal. 360 (1874); *Albertson v. Lough-*
lin, 173 Pa. St. 520 (1896).

² The report of the master is omitted.

*note seems the acct.
present (2 judges). Note seems & notes not orig
prices & so falls with note. Besides orig.
Cont. was not divisible & so it also was
wholly unenforceable.*

Gen'l principle is well settled. A note ~~to~~ to secure two claims, one legal & the other il-legal is good as to the legal. All the judges admitted that. Only? here was as to whether claim secured was di-
visible.

Also clear that a note given for two debts one illegal cannot be enforced. Note treated as a single promise. Where it can be shown just how much of note was for each claim this re-
sult is not a necessary one but is settled law.

Ross, dissenting, says that note given to secure note if that void no debt to se-
cure. That note was intended to secure. ^{presumptively} But note ^{only} Ch.
seems technically so. But note ^{only} Ch.
dication of payment of debt (not being note of 3rd party given at time of orig transaction as payment). Is not note given sub-
stantially to secure this debt too good as to good part of debt. Reaches the
same ~~clear~~ result, it seems ^{little authority}.
^{But you get what there is it with dissenting judge.}
Ross also says orig. Contr. indivisi-
ble as not clear how much was to be paid for each article. That rather strong. If we 116\$ was gen'l but that
cd well be taken as the price of the
good-will. As a ? if fact that seems
most likely.

amount an item of \$116 was added, which was included in the note first due. It is not found what the consideration for that item was. The good will of the business was included in the sale, and was not estimated in the inventory. It is probable that it may have been estimated by the parties at that time. For the amount so ascertained the defendant Carpenter executed four promissory notes payable to said Peterson, or order, and secured the same by the mortgage sought to be foreclosed. Said notes have all been paid, but the last, which was for \$800; and that fell due on the 24th of July, 1876. The interest on that note was paid to the 24th of July, 1876.

On the 28th day of October, 1872, and before the maturity of any of said notes, Peterson sold them and the mortgage for an adequate consideration to the petitioner, the petitioner then believing the notes to be based on a valid and legal consideration, and not suspecting that any illegal element entered into the consideration.

Of the property sold by Peterson to Carpenter, and which formed a part of the consideration of said notes, the master has found there were the following goods, in kind and amount: Lager beer, \$23.94; cider, \$4.22; ale, \$209.38; porter, \$6.72; alcohol, \$2.25.

The defendant Carpenter claims that if any part of the consideration for the notes was illegal, they are void; that no recovery could be had upon them; and that a court of equity cannot grant any relief to the petitioner.

The first inquiry is, was the sale of any of the articles above enumerated prohibited by law? It is found that the lager beer was not an intoxicating drink, and its sale was not then prohibited, the act forbidding its sale having been passed in 1878. The sale of the cider was not illegal, unless the place where it was sold was a place of public resort.¹

The sale of the ale, porter, and alcohol being illegal, the consideration for the notes, as far as the value of those articles went to make up the amount for which the notes were given, was an illegal consideration.

The important question in the case is, as to the effect that such partial illegality of consideration is to have upon the rights of the parties. *Robinson v. Bland, administratrix of Sir John Bland*, 2 Burr. 1077, has always been regarded as a leading case; and opinions were given in it by Lord Mansfield and Justices Denison and Wilmot. The declaration contained three counts; the first, upon a bill of exchange; the second, for money lent and advanced; and the third, for money had and received. A verdict was found for the plaintiff for £672, the amount of the bill of exchange. It was found

¹ The discussion of this question is omitted, the conclusion reached being that the sale of the cider was not illegal.

that the consideration for the bill of exchange was £300, lent by the plaintiff to Sir John Bland at the time and place of play; and £372 were lost at the same time and place by Sir John Bland to the plaintiff at play. It was held that the £372, part of the consideration for the bill, being for money lost at play, could not be recovered, all such securities being void under the statute; and that a part of the consideration for the bill being illegal, no recovery could be had under the first count; that the plaintiff was entitled to the £300 lent, and was allowed to recover it, under the count for money lent and advanced.

Security here
means note
& not usury
saying a note
to secure it.

Judge Denison says there is a distinction between the contract and security. If part of the contract arises upon a good consideration, and part of it upon a bad one, it is divisible. But it is otherwise as to the security. That, being entire, is bad for the whole. Judge Wilmot: "As to contracts being good and the security void, —the contracts may certainly be good, though the security be void."

The same principle as to such a security being void was enunciated in *Scott v. Gilmore*, 3 Taunt. 226. See also *Yundt v. Roberts*, 5 Serg. and Rawle, 139; *Phillips v. Cockayne*, 3 Campbell, 119; *Edgell v. Stanford*, 6 Vt. 551. These two first cases have oftenest been quoted as authority for the rule that has generally prevailed in the English and American courts, that where a part of the consideration for a security is illegal the whole security is void.

The cases referred to by counsel for defendant were all cases where attempts were made to enforce such securities, and the cases of *Hinesburgh v. Sumner*, 9 Vt. 23, and *Woodruff v. Hinman*, 11 Vt. 592, were of the same kind. In none of these cases was the court called upon to decide what the effect of holding the security void would be upon the original contract, where that was bad, in part, upon a good and legal consideration.

In *Carlton v. Woods*, 28 N. H. 290, the question was presented. The declaration, in that case, contained counts upon several promissory notes, and a count for goods sold and delivered. The plaintiff agreed to sell the defendant a stock of goods and groceries at cost and freight. A schedule of the articles was made, and the cost of each. The sum total of the cost of all the articles was divided into several parts, and the notes declared upon were given for the same. Among the articles so sold were some spirituous liquors illegally sold, the price of which formed a part of the consideration for the notes. A verdict was taken for the plaintiff, for the cost of the goods remaining unpaid, except the spirituous liquors; and judgment was to be rendered on the verdict, or it was to be set aside, as the opinion of the court should be. It was held that the counts upon the notes were not maintainable; that the consideration of the sev-

our court
follows this
case.

Use in court
divisible
Cm-ho et.

eral notes was, in part, illegal, and, therefore, no recovery could be had upon them; that the legal effect of the contract was, that each article was to be valued separately, and that the sale and delivery of each article formed the consideration for the promise to pay for it; that the contract was divisible; and, while the separate value of the articles sold could be ascertained, as fixed by the parties, the principle is not readily seen, which would defeat the right of recovery for the stipulated price of that portion, the sale of which was legal; and judgment was rendered on the verdict. The same was substantially held in *Walker v. Lovell*, in the same volume, 138. The law does not favor any party in evading payment, while he retains the consideration.

The notes which were given for the good will and property sold to Carpenter were all infected with illegality, and the defense of illegality attached to all of them; so that, if what is now claimed as a defense can be allowed, if proceedings had been instituted to compel payment before anything had been paid, the entire claim could have been defeated, notwithstanding Carpenter had received, and was in the enjoyment of the property, upon the ground that the portion of the property above enumerated was illegally sold. It has somewhere been said, that the declaring such a security void was to be regarded as a punishment of the party for having made an illegal contract. The loss of the property illegally sold would generally be considered a sufficient punishment, certainly, when the sale was only *malum prohibitum*, and no wrongful intention appears. But a court of equity could never hold that one might be deprived of his entire fortune, because, in the consideration agreed to be paid for it, there was intermingled some article the sale of which was prohibited. We regard the case of *Carlton v. Woods*, *supra*, as sound law and well sustained by authority. Its application works out just and equitable results, and we shall apply the principles there enunciated in the decision of this case.

Peterson could have recovered against Carpenter in an action of assumpsit, for all that was sold to him, except the ale, porter, and alcohol. The mortgage would be treated as security for the debt due from Carpenter, on account of the property legally sold to him. Peterson might have foreclosed the mortgage, and thus have compelled payment of the debt.

The petitioner, by his purchase of the notes and mortgage, acquired all the rights, legal and equitable, of Peterson. He could maintain a suit at law for his own benefit, in the name of Peterson, or a petition in equity, as assignee of the mortgage, to foreclose it. And in the disposition of such a petition it is the duty of a court of equity, which has been said to be the great sanctuary of plain dealing and honesty, to compel the payment of that portion of

notes here
bad.

why isn't mortgage
like note.

the debt that was secured by it, that was legally and fairly contracted.

The decree of the Court of Chancery is reversed and cause remanded, with mandate that a decree be entered for the petitioner for the amount due on the note for \$800 described in the petition, with interest after deducting therefrom the sums of \$209.38, \$6.72, and \$2.25, being for the ale, porter, and alcohol illegally sold,—as of the date of the note. If the amount due cannot be ascertained from the computations made by the master, it is to be ascertained in such manner as the court may direct.

Dissenting opinion was delivered by

Ross, J. I am unable to concur in the decision of the court in this case. On the facts found by the master, it may be questionable whether the sale of the cider was illegal, within the exact terms and language of the statute. However, when a man establishes a business for the bottling and sale of cider and other fermented drinks in a city like Burlington, has a warehouse for storing, manufacturing, bottling, and vending the same, and keeps an office, he so far makes the place of his business a place of public resort for the sale of cider, although the vending is carried on by solicitation of orders at the houses and places of business of his customers, and the delivery of the bottled cider is at the latter places, that in my opinion, it comes within the spirit and scope of the statute, and without any forced construction, within its language. But I do not regard this point very material; and should not on this ground have placed my dissent upon record. A part of the consideration of the note being illegal, the note is void and no action can be maintained thereon to enforce its collection. To the cases cited by the court, in the main opinion, may be added *Cobb v. Cowdery et al.*, 40 Vt. 25; *Bowen v. Buck*, 28 Vt. 308. In *Cobb v. Cowdery*, *supra*, the distinction is taken between a consideration, in part void, and a consideration in part illegal. The note failing, what is there left for the mortgage to stand upon? The mortgage is but an incident to the debt it secures. On the authorities cited by the court in support of its decision, as well as all the reasoning, partial illegality of consideration avoids all securities. The note was a security, or evidence of the debt, of a higher nature than the original contract. The latter was merged in the note. The note in suit, and all the notes secured by the mortgage, were tainted by illegal consideration entering into them. Each note being an entire contract of itself, no division of the legal from the illegal part of the consideration could be effected. Courts established for the enforcement of law will not give aid or countenance to anything illegal; nor, where the illegal is commingled with the legal, will they aid in separating, or purging the former from the latter. Their

Hold note,
void as may
does.

Contr

proper function is to establish and enforce the legal and to condemn and punish the illegal. Where a part, however small, of the consideration of an entire contract is illegal, the whole contract is tainted, and courts will not compel its performance. *Collins v. Blantern*, 2 Wils. 341, is a leading case on this subject, in which the Lord Chief Justice Wilmut uses the quaint but forcible, and often quoted language: "*You shall not stipulate for iniquity*; all writers upon our law agree in this, no polluted hand shall touch the pure fountains of justice; whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul! O procul este, profani.*" The mortgage is an entire contract. Its consideration was the notes, the payment of which was therein secured; every one of which was tainted with an illegal consideration in part. It was not given to secure the performance by Carpenter of his contract with Peterson, of July 24, 1872, by which he purchased his business and stock in trade, but was given solely to secure the payment of the notes which were executed in payment of that purchase. If the action were upon the notes, it is conceded that no recovery could be had; because every one of them is tainted with illegal consideration. The illegal could not be separated from the legal portion of the consideration; and an enforcement of the collection of the notes would be the enforcement of an illegal contract. How does it differ when the mortgage, which is but an incident to the notes, is allowed to be foreclosed? Is it not an enforcement of an illegal contract? To foreclose the mortgage for the legal part of the consideration, must not the illegal portion be ascertained and rejected; which the majority hold could not be done, if the action were upon the notes? What is the foreclosure but an action upon the notes described in its condition? and to ascertain the legal part of the consideration of the mortgage must not the notes be treated as divisible? I can see no other means of separating the legal from the illegal part of its consideration. In *Vinton v. King*, 4 Allen, 562, Metcalf, J., says: "In an action brought by a mortgagee against his mortgagor, on a mortgage given to secure payment of a note, the defendant may show the same matters in defense (the Statute of Limitations excepted, 19 Pick. 535) which he might show in defense of an action on the note." I am not aware of any exception to the rule thus stated, nor of any case to the contrary. I am not unaware that Mr. Jones in his work on mortgages, § 620, says: "The mortgage may be upheld for such part of the consideration as was free from the taint of illegality when the consideration is made up of several distinct transac-

notice

tions, some of which are legal, and others are not, and the one can be separated with certainty from the other." The cases he cites support this doctrine: *Feldman v. Gambel*, 26 N. J. Eq. 494; *Williams v. Fitzhugh*, 37 N. Y. 444; *McCraney v. Alden*, 46 Barb. (N. Y.) 272; *Cook v. Barnes*, 36 N. Y. 520.

Why is this
true. Is it
out of a security
note?

It may well be admitted that a mortgage given to secure the payment of several notes, or debts, a part of which arose out of wholly legal transactions, and a part of which were tainted with illegality, could be enforced to compel the payment of the former alone. In such a case the orator would not have to show in evidence, nor rely upon anything illegal, in maintaining his suit. In the language of Gibbs, Ch. J., in *Simpson v. Bloss*, 7 Taunt. 246, in speaking of *Faikney v. Reynous*, 4 Burr. 2069, and *Petrie v. Hannay*, 3 Term Rep. 418: "The ground of their decision was, that the plaintiffs required no aid from the illegal transaction to establish their case." This, as I understand, is the test most frequently applied in this class of cases. If the plaintiff can show a good cause of action, independent of, and without bringing into the case anything illegal, either by way of proof or otherwise, he may maintain his action therefor. If, on the other hand, he derives any aid from the illegal part of the transaction, by being obliged to show it to make out the legal part, or otherwise, he must fail. The court will not allow the unclean thing within the temple of justice. In the foreclosure of his mortgage the orator was bound to show in proof his notes, every one of which was tainted with illegality; and for that reason the notes all fall, and the mortgage given to secure them alone, falls with them. This point my brethren have not deemed worthy of their attention, nor alluded to. But if I am in error on this point, I cannot concur with my associates in holding that the original contract is divisible. It is in writing, and amenable to the rules of evidence which forbid varying, lessening or enlarging such contracts by parol testimony. It is in the following language: "In consideration of three thousand three hundred thirty-seven dollars and eighty-one cents received of John W. Carpenter, I, Benjamin D. Peterson do hereby sell, transfer and assign unto said Carpenter the good will of a certain business for bottling cider, soda and mineral waters, now carried on by me in Burlington, together with all the stock, tools, bottles, machinery and fixtures, now in use in said business, as specified in certain inventories hereto attached, and I agree to deliver to said Carpenter the gross amount of property described in said inventories, which said inventories are signed with my name." The inventories are referred to and made a part of the contract to show what personal property was to pass with the good will of the business. They are not referred to for the price of the several articles included. The master has found that the aggre-

gate of the prices there carried out, did not amount to the sum named in the contract, and for which the notes were given, into \$116. Hence, if the prices carried out on the inventories are to be regarded as a part of the contract, they do not show that the articles were severally sold for the price set against them, but the reverse. The contract is to be construed as a whole. Thus construed, it is an entire, indivisible contract. It was a sale of a business, as a going concern, including the good will, stock in trade, machinery and fixtures. It is not to be inferred, or intended, that Peterson would have sold the good will of the business, without selling the stock in trade, machinery and fixtures, nor that Carpenter would have purchased the latter without the former. It was not the sale of the good will as one separate transaction, of each bottle, barrel, and fixture as another separate transaction, and so divisible. But one consideration is named or paid; and but one thing is sold—the business, including the stock, &c., and good will, as a going concern. As said by Devens, J., in *Young & Conant Mfg. Co. v. Wakefield*, 121 Mass. 91: “If but one consideration is paid for all the articles sold, so that it is not possible to determine the amount of consideration paid for each, the contract is entire (*Miner v. Bradley*, 22 Pick. 457). So if the purchase is of goods as a particular lot, even if the price is to be ascertained by the number of pounds in the lot, or number of barrels in which the goods are packed, the contract is also held entire (*Clark v. Baker*, 5 Met. 452; *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350). While in the cases last referred to, it could be ascertained what was the amount of consideration paid for each pound, or barrel, yet the articles having been sold as one lot, it was to be inferred that one pound or barrel would not have been sold unless all were sold.” On these principles, if the mortgage can be upheld as a security for the payment of the consideration of the original contract, as well as the notes given in payment therefor, the consideration of the contract is entire, indivisible, and tainted with illegality, and for that reason void, and should not be enforced. To my mind, the cases principally relied upon by my associates are not authority for their decision. In *Robinson v. Bland*, 2 Burr. 1077, the transactions were separate and distinct. One was borrowing three hundred pounds; the other losing three hundred seventy-two pounds in gaming. While the bill of exchange given for the two was held to be void because tainted with in part illegal consideration, the plaintiff was allowed to recover on the count for money loaned, for the three hundred pounds borrowed by the intestate. The plaintiff could establish this part of his claim without the aid of the other, in any manner. The remark of Justice Denison, made in that case: “There is a distinction between the contract and the security. If

Too strict
an idea of
divisible
no doubt.

part of the contract arises upon a good consideration, and part upon a bad one, it is divisible. But it is otherwise as to the security; that being entire, is bad for the whole," is not to be pressed beyond the case in hand, and given universal application. His language, as to its being "*divisible*," was true as applied to the facts of that case. The law was more accurately expressed by Mr. Justice Wilmot: "Here are two sums demanded, which are blended together in one bill of exchange; but are divisible in their nature, as to the money lent. The cases that have been cited are in point, that it is recoverable." *Carleton v. Woods*, 28 N. H. 290, comes nearer to supporting the decision of the majority of the court, but in my judgment, is distinguishable from the case at bar. It is there distinctly held that if the contract is entire, and part of the consideration is illegal, the contract is void; but that where an entire stock of goods is sold, at one and the same time, but each article for a separate and distinct agreed value, the contract is not to be regarded as entire and indivisible. The sale was for cost and freight, and Woods, J., says: "We are unable to see how this case differs from the case of a sale by a merchant of various goods to his customers, at one and the same time, for separate values, stated at the time, which, when computed, would, of course, amount to a certain sum in the aggregate." It was on this theory that the court held, that, although the notes could not be maintained, because a part of the consideration was for spirituous liquors illegally sold, yet, on the general counts in assumpsit, for goods sold and delivered, the plaintiff might recover for the goods sold, as the court held, independently of, and as transactions separate from, the purchase of the liquors. To say the least, this was pressing the doctrine of divisibility of a contract to the extreme verge, and I am unwilling to go further. There may have been more in the case than appears in the report, justifying the holding of the court. On the facts stated, I think the authority is clearly against that contract being divisible. That case, however, lacks the element of being the sale of a going business, including the good will, and does not appear to have been reduced to writing. In my judgment, the decree of the Court of Chancery should be reversed, and the cause remanded, with a mandate to enter a decree dismissing the bill with costs.

TAFT, J., desires me to say that he concurs in the views I have expressed, except in regard to the sale of the cider being illegal; on which point he concurs in the views of the majority of the court.

Two questions in these cases:

1. Must a present oblig. be properly described in the note?
2. How definitely do future advances have to be described?

In our case. Both questions involved:

As to 1. Attempt to include in note the notes on which note was surety; i.e. to have note secure notees' right to indemnity. The note said absolutely nothing as to that. Nor was there any general statement which cd apply to it. The \$4000 note was definitely described. The rest of description was of future advances. So Ct right in holding that the surety claims were not included. Just what description is enough is up later. Provision as to receipt seems to refer to future receipt - tho. that not clear. See pp. 267*

As to 2. Just what Ct. meant is not clear. If meant that note must describe advances so that one reading cd tell their exact nature & amt, that clearly error & next Ct case in same Court shows that it wd not be followed. See 272 &

If meant that note must limit them so that one by making inquiry cd discover their nature & amount then something to be said for it. But who is inquiry to be made of? Of maker, notee, or 3rd parties? Evidently if of maker or notee then the nature & amt. of advances cd always be found out from them & so no limit in note wd be nec. If of junior in advances must be able to find out from 3rd parties then it is obvious that statement in note must be very

Mtge became liable to Cowles & E Cowles & Co. for mtgor.
& took mtgor's receipt.

3rd July. Mtge given.

19th Sept. Made advances & receipt promising to be on
note to E. Cowles & Co.

SEC. III.]

PETTIBONE v. GRISWOLD.

265

CHAPTER III. (Continued)

SECTION III. FUTURE ADVANCES.

PETTIBONE v. GRISWOLD.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1822.

(4 Conn. 158.)

This was a bill in chancery to foreclose the equity of redemption of the defendants in certain mortgaged premises. The bill stated, that on the 3d day of July, 1815, Giles Griswold, for the consideration of 4000 dollars, conveyed to the plaintiff's testator three pieces of land in Burlington, by a deed containing the usual covenants of seisin and warranty, to which there was a condition annexed, that if the said Giles Griswold, his executors, &c., should pay said grantee one note of even date therewith, executed to said grantee, for 4000 dollars, payable in six months, at the Hartford bank, and all other notes the said grantee might indorse, or give, for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against the said Griswold, then said deed to be void; that before the execution of this deed, the plaintiff's testator, with Griswold, executed, for Griswold's benefit, two joint notes, one to Seth Cowles, dated the 19th of April, 1814, for 2173 dollars, 97 cents, payable in six years from the date thereof, with interest annually, and one to Elijah Cowles & Co. of the same date, for 296 dollars, 95 cents, payable in six years, with interest annually; for which Griswold gave his receipt to the plaintiff's testator, and agreed to exonerate and indemnify him against all claims and demands on account of said notes; that on the 19th of September, 1815, Griswold also received of the plaintiff's testator sundry notes of hand, amounting 1148 dollars, 62 cents, dated the 21st of February, 1815, for which Griswold gave his receipt, promising to account with the plaintiff's testator on said joint note to Elijah Cowles & Co.; that the mortgaged premises have been levied upon, by several creditors of Griswold, and set off to them, respectively, on execution; that Griswold had not paid and indemnified the plaintiff's testator for all the notes that he had indorsed or given for him; nor had Griswold paid all the receipts the plaintiff's testator held against him, but the notes given by the plaintiff's

Mtge given in May to Se-
Cur a 4000 note then
given and all other
notes mtge "might" in-
dorse. Was then

outstanding claims
for about 2500. In
Sept further advances
were made. At this
time mtgor gave
a receipt promising
to be for part of the

advances prior
to mtge. Cds
of mtgor have
been on the
premises.

(2)
Held mtge to
cover these 50
in deposits as
to give insuff-
ficient infor-
mation to s.d.
not a contra
to policy of
lending
act. Also
void. (1) Held
past advances
not covered
by mtge's de-
scription of deb-
tho' they had
then been made
too mtge does not
cover them.

in receipt
- mtge.

testator to Seth Cowles and Elijah Cowles & Co. remain entirely unpaid by Griswold, but have been principally satisfied by the plaintiff's testator, and his estate is liable for the residue, Griswold being a bankrupt; nor had Griswold ever paid and satisfied his receipt of the 9th of September, according to the tenor thereof, but the plaintiff now holds the same unsatisfied. There were other averments, on which no question arose.

To this bill the defendants demurred; and the case was reserved for the advice of all the judges.

HOSMER, Ch. J. The plaintiff has brought his bill to foreclose a mortgage, the condition of which is, to secure to the mortgagee the payment of a note accurately described, which, it is presumed, has been paid, as there is no allegation of non-payment; and likewise to secure, "all other notes the said grantee might indorse for or give for said Griswold, at the bank or elsewhere, and all receipts said Pettibone, deceased, might hold against said Griswold." The land mortgaged has been levied on, by executions against the mortgagor; and the controversy is between the mortgagee and the execution creditors.

The notes of hand given to Seth Cowles and Elijah Cowles and Co. were in existence at the date of the mortgage, and are not included in the condition. They might and ought to have been described, or embraced, by some intelligible description of them. But the expression, "all notes the said grantee might indorse for or give for said Griswold," manifestly refers to future contracts, and not to notes then existing. The receipt of the 19th of September, 1815, renders it necessary to proceed further in the discussion of this case, or the preceding observations would be conclusive on the whole controversy.

On the extent to which a mortgage may be taken, I shall not express a definite opinion, as the exigencies of the case do not require it. It undoubtedly may be for existing debts, existing liabilities and, perhaps, for debts to be contracted in future. But the manner in which it may be done, forms an important consideration. It is the policy of our laws, and experience has demonstrated the wisdom of it, that the titles to real estate should be registered for the benefit, not of the parties, but of creditors and all others interested. "All grants and mortgages of houses and lands shall be recorded at length by the town clerk; and no deed shall be accounted good and effectual to hold such houses and lands against any other person or persons but the grantor or grantors and their heirs only, unless recorded as aforesaid" (Stat. 302, § 9). It is the object of this law to prevent fraud and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incum-

as to prior
note to
the Cowleses.

as to future
advances in
Sept.

Comm. At.

Specific. 3rd parties wd not know of advances generally but only of specific transactions. Payments to be made by mortgagee on some particular debt due by mortgagor or work, ~~but~~ materials, or like to be furnished to further some particular object. 3rd parties might know about ^{where} mortgage might indicate whom ^{later encumbrances} ~~whom~~ wd inquire of might come within rule that mortgage must put ~~into~~ later encumbrances on inquiry. But clearly for such a rule wd confine mortgagee for future advances very strictly. The law does not require that. It is generally held that the description of the future advances may be perfectly general. Subsequent encumbrances know there is danger and he can inquire of mortgagor & mortgagee. If mortgagee shd mislead him he wd have preference on ground of setoff.

Of course nothing in recording acts requiring anything more than that a person shd not be permitted to advance money w.o. warning of defect in title or limit on title. Every where conceded that as betw mortgage & mortgagor the mortgage is good tho description of debt is indefinite. How can creditors stand in better position than ~~debt~~ mortgagor. Generally do not. But in some states the recording acts expressly protect creditors as well as B.F.P.s. Then our Court since they that they were applying recording acts protected creditors. In Conn. creditors are within the protection of recording acts. See St. opposite.

... of case in note p. 26) are exactly in accord with our case. Except distinction in 6 Watts.

(1) 13 Conn. holds that if mortgage is apparently for a present debt future advances can be included. That is great weight of authority. 41 Conn. is same & 12 N.J. Eq. is Contra.

(2) 46 Conn. & 108 Ill. are purely as to lack of description of present debt - of later - nothing as to fut. advances.

* Receipt given in Sept. referred back to E. Cowles Co. note. Can receipts be construed to mean not only future receipts but future receipts as to future debts. Certainly that seems strong.

11 branches on the land mortgaged. A creditor is not obliged by law to make inquiry *in pais* concerning the liens on the property of his debtor; but on application to the record he may acquire all the information which his interest demands. At least, he must have the power of knowing from this source the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors.

See p. 272

*See p. 272
referred to the
sd shd have
written read
"concerning the
existence of
liens"*

The condition of the deed under discussion, is dangerously indefinite and is at war with the policy of the recording system. It embraces all future notes and receipts without the designation of any, and baffles the inquiry of creditors and others relative to the condition of the mortgaged estate. A condition to a deed made to secure all future supplies, debts and liabilities, of every possible nature and description, would not be more lax and indefinite. The creditor could know nothing from an examination of the record, and must be cast on his debtor for information, the very person who would be least inclined to give it: and successive obligations, fictitious or actual, might be made to lock up his land, in defiance of every claim against him.

I am well aware that absolute certainty is not always to be expected from an examination of the records of land titles; but there always may and ought to be a certain object after which suitable inquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another in the office of sheriff or collector; or as administrator on an estate. In all these cases an inquiring creditor cannot know from the town record the precise incumbrance; but he has notice of certain definite facts, which point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds, which neither communicate any certain information nor designate any track in pursuance of which information may be obtained.

The other Judges were of the same opinion.

Judgment to be entered for defendants.¹

¹ *Accord, North v. Belden*, 13 Conn. 376 (1840); *Bramhall v. Flood*, 41 Conn. 68 (1874); *Stearns v. Porter*, 46 Conn. 313 (1878); *Garber v. Henry*, 6 Watts. (Pa.) 57 (1837), *semble*; *Bullock v. Battenhausen*, 108 Ill. 28. (1883). Compare *Bell v. Fleming's Ears.*, 12 N. J. Eq. 1, 490 (1858, 1859).

Oblig. here was a present one. omit.

Notes securing all monies belonging to estate of Heath in debt for, all securities of estate, &c by debt of estate, &c of what debt owed

STOUGHTON v. PASCO.

SUPREME COURT OF ERRORS OF CONNECTICUT, 1825.

(5 Conn. 442.)

This was a bill in chancery, brought by Stoughton, to redeem mortgaged premises.

The plaintiff and Jonathan Pasco were trustees of the goods and effects of one Stephen Heath, deceased, for the benefit of certain legatees, according to his last will and testament. The amount of the property in the hands of the trustees, in February, 1812, which had been inventoried, was, at the inventory price, 6501 dollars, 28 cents, and of property not inventoried, 302 dollars, 50 cents. On the 8th of February, 1823, Jonathan Pasco, as trustee as aforesaid, was justly indebted to the plaintiff in a large sum, the amount of which was, at that time, unascertained. To secure such sum, on the day last-mentioned, he executed a mortgage deed of the premises to the plaintiff, which was duly recorded, with a condition subjoined in these words: "If said Pasco shall pay to said Stoughton all monies in his hands belonging to the estate of Stephen Heath, deceased; and also deliver to said Stoughton all notes and other securities for money belonging to said estate in his hands; and shall, in all respects, render to said Stoughton a true account of all monies and securities for the payment of money belonging to said estate, within twenty days from this date; and shall pay to said Stoughton his the said Pasco's note of hand, payable to said Stoughton, for the sum of 210 dollars, on demand, with interest, dated March 5th, 1814; then this deed to be void," &c. The court found, that there was due to the plaintiff from said Pasco for monies and effects in his hands of the estate of Stephen Heath, deceased, intended to have been secured by said mortgage deed, the sum of 3137 dollars, 85 cents; besides the amount of the note mentioned in the mortgage. By subsequent deeds, dated the 8th and 22d of February, 1823, and duly recorded, Jonathan Pasco mortgaged the premises to Ashna Pasco, after a computation between the said Jonathan and the plaintiff, ascertaining the debt due to the latter. Before the execution of these mortgages, and before the debts secured by them had accrued, Ashna Pasco had notice, by information from Jonathan, of such computation and settlement, and that the sum due to the plaintiff was more than 2800 dollars.

Jonathan and Ashna Pasco were made parties defendants to the

estate was not tiled & amt determined Ashna Pasco, co-def had notice of the & took 2nd mortgage on property Held sufficient. had all just due on a true whereby I can get definitely information Lord vs outgo & also vs 2nd mortgage with note

This case is as to a present indebtedness only - see 269 K. Our case rather adopts the rule that the description must be such as to lead one to place or persons where exact amt. pt. can be determined. Of course did not have to hold that as in this ^{note} ^{no clearly def.} ^{Query. Suppose land secured but tenant never took for Adams due.} ^{in the} ^{one} ^{a few} ^{other} ^{cases} ^{talked} ^{same} way where point did not have to be decided. But genl rule is that a genl description is sufficient & that if this ^{being construed} includes the debt & was not such a description as wd mislead subsequent encumbrancers it is suff. All debts owing is good. Debt may be stated as a lump sum when consists of separate sums due from several obligors who join in mtge. May be lump sum when really for part debt as to part & pt. advances as to part.

bill. As against Jonathan the court decreed a foreclosure, but denied the relief sought against Ashna, considering the mortgage in question to be void in relation to him. To review this determination, the plaintiff procured the record to be transmitted to this Court, pursuant to the statute.

HOSMER, Ch. J. The general question in this case is whether the mortgage made by Jonathan Pasco to the plaintiff is void in respect of Ashna Pasco, a subsequent mortgagee, except as regards a small debt by promissory note.

The objection made, on the defendant's part, to the granting of the prayer of the plaintiff's bill, is founded on the law requiring the recording of deeds. It is insisted that the policy of the recording system will be violated by giving validity to a mortgage, containing, as the one in question is supposed to do, no reasonable certainty in the description of the debt intended to be secured. The determination of this Court in *Pettibone v. Griswold*, 4 Conn. Rep. 158, is principally relied on; and is claimed to sustain the defendant's objection.

There are two questions embraced in the present case. The first is, whether the demand of Stoughton is of such a nature as to authorize the mortgage security; and the second is, whether it is described with such reasonable certainty that, in respect of it, a subsequent mortgagee is legally affected with notice.

1. In *Pettibone v. Griswold*, before cited, it was said, that a mortgage may be taken "for existing debts, existing liabilities, and perhaps for debts to be contracted in future." The court has found, that Jonathan Pasco was justly indebted to the plaintiff, as trustee on Heath's estate, in the sum of 3137 dollars, 85 cents; and that this sum was intended to be secured by the mortgage deed to Stoughton. The precise sum of money due to the plaintiff had not been ascertained at the date of the mortgage; and hence the phraseology of the condition, that if Jonathan Pasco should pay to Stoughton all the monies, and deliver to him all the securities for money in his hands, belonging to Heath's estate, and render a true account, the deed should be void. That Jonathan Pasco was under a legal obligation to do what he stipulated, and that, as to him, Stoughton had a just demand, to the extent of the stipulation, must be implied by every one who reads the above condition. It would not enter into the imagination of any one that the mortgage was for a sum of money not due; and that, contrary to common sense and universal usage, Pasco had made a pledge of his estate to secure to the plaintiff a mere gratuity. But this point need be pursued no further, as the court, in the decree passed, considered the mortgage valid as between the parties.

2. The question remains whether the demand of the plaintiff is

←
Was a present
debt unliquidated. &
Seems to think
good. But
no exception
to lower Ct.
holding that
was good.

*To notice, being
recorded, &
said notice
having actual
notice, good
vs. him.*

described in the mortgage, with such reasonable certainty, as from the record to affect a subsequent mortgagee with notice.

Now, what would such person understand from reading the aforesaid condition? On the principle of constructive notice of the record, the subsequent mortgagee must be supposed to have read the deed with its condition; and hence the propriety of the proposed question. On such perusal, he must be presumed to know that the mortgage was for a debt in some manner resulting from the trust estate in the mortgagor's hands, due to the co-trustee, the plaintiff; that the precise amount, at the date of the mortgage, was not ascertained; that it embraced all the monies and securities of Heath, in the hands of Pasco; and that this person had bound himself to render a true account of his indebtedness. In addition to this, let it be remembered that Ashna Pasco, previous to the delivery of either deed to him, had information from his mortgagor that the account between Jonathan Pasco and Stoughton had been adjusted, and that the sum now claimed as a debt was acknowledged to be due.

That the condition of a mortgage deed must give *reasonable notice* of the incumbrance on the land mortgaged, is an established principle. This is the undoubted criterion, by which, in respect of third persons, the validity of the mortgage is to be tested. What, then, is reasonable notice? Is it requisite that the condition should be so completely certain, in every particular, as to preclude the necessity of all extraneous enquiry? Certainly not. It was adjudged in *Pettibone v. Griswold*, before cited, that a mortgage to indemnify a surety for the official good conduct of another is valid universally; and yet the event on which an indebtedness may arise, as well as the amount, are utterly unforeseen and contingent. Without a specification of either of these facts, there exists that reasonable notice which, in favor of those who are not parties to the mortgage, the law demands. The object of the recording law is to prevent fraud on purchasers and creditors; and such facts must be reasonably notified as are sufficient for this purpose; but, as has been shewn, notice perfect and complete, without any enquiry *dehors* the record, is not required.

One head of presumptive notice is this: that the law imputes to the purchaser the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprized him. Hence it has become a principle in a court of equity, that the notice which presents a certain object, concerning which successful enquiries without unreasonable inconvenience may be made, is sufficient. In *Peters v. Goodrich*, 3 Conn. Rep. 150, the above principle was recognized and applied. Curtis executed a mortgage deed to Goodrich, which was duly recorded, with condition to in-

demnify him against a promissory note, of which the latter was an indorser. To foreclose the equity of redemption, a bill was brought by Goodrich, from which it appeared that the mortgage was variant from the note, both in respect of its date and of the person to whom it was payable. The defendant, who was a subsequent mortgagee, objected against the correction of these mistakes, upon the specific ground that the description in the mortgage deed must be precisely adhered to, pursuant to the supposed policy of the recording system. In the delivery of their opinion the court observed, that "as between the parties, it is unquestionably clear, that the misconception of the date of the note and of the promisee admitted of correction, on the common principles applied in chancery in similar cases; and the second mortgagee had such constructive notice of the fact from the recorded deed as placed him in no better condition than the mortgagor. Whatever is sufficient to put a person on inquiry is considered in equity to convey notice; for the law imputes to a person the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprized him. Had the second mortgagee applied to Goodrich for information, as it was his intention to represent the facts correctly, relative to the mistakes, he would have had a communication of all the knowledge he now possesses."

The same principle was recognized by the court in *Pettibone v. Griswold*, before cited. After having declared it to be the policy of our law that the title to real estate should be registered for the benefit of creditors and all others interested, it was observed by the court: "That it is the object of this law" (the act requiring deeds to be recorded) "to prevent fraud, and give security and stability to title. It results, unquestionably, that the condition of a mortgage deed must give reasonable notice of the incumbrances on the land mortgaged. A creditor is not obliged by law to make enquiry *in pais* concerning the liens on the property of his debtor; but on application to the record, he may acquire all the information which his interest demands; at least, he must have the power of knowing from this source the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result. And what is not of less importance, the incumbrance on the property must be so defined as to prevent the substitution of everything which a fraudulent grantor may devise to shield himself from the demands of his creditors." In the argument of this case it has been supposed that the court, in *Pettibone v. Griswold*, had required perfect and complete certainty in the condition of a mortgage, so far as relates to strangers to the transaction, and to such a degree as to preclude the necessity of any further enquiry. But the error is most obvious and resulted en-

exclusion of
Correction
was made
by Ct.

tirely from the construction of a single sentence in the opinion expressed, disjoined from all other parts of it; as if it had been declared in the form of an axiom, and were insulated and alone. I readily admit that the paragraph immediately succeeding the rule relative to notice, was not expressed with a precision that defies all criticism. Instead of the expression "concerning the liens," more correctly it should have been "concerning the existence of the liens." It was expected, however, to receive its construction as being the part of an entire subject, each sentence contributing something to the precise development of the court's opinion; in pursuance of the maxim, *Ex antecedentibus et consequentibus fit optima interpretatio*. More especially may it be demanded, that it be read with this qualification: "at least, he must have the power of knowing from this source," i. e., from the condition of the deed, "the subject matter of the mortgage, that his investigation may be guided by something which will terminate in a certain result." It is extremely obvious that the case of *Pettibone v. Griswold* was not affected by the preceding principles; and this may account for their being perhaps more loosely expressed than they would have been, had a close application of them been required. The mortgage in that case embraced *all future notes and receipts*, without the designation of any, and supplied *neither information, nor the probable means of successful enquiry*; and, as there was no imaginable check on the substitution of notes and receipts at pleasure, and without limitation of time, the policy of the recording system, if such mortgage were valid, would effectually be defeated. A condition to a deed made to secure all future supplies, debts and liabilities, would not be more dangerously lax and indefinite.

The principle contended for by the defendants is refuted by the case of *Peters v. Goodrich*, by the expressions already recited from *Pettibone v. Griswold*, and by other parts of the same case. The latter case requires that the record should contain sufficient information relative to the subject matter of a mortgage to direct the enquirer to the necessary intelligence, and to prevent a debtor, by extreme indefiniteness and generality, from the substitution of every possible demand at his pleasure. "I am well aware" (said the Judge, when delivering the opinion of the court) "that absolute certainty is not to be expected from an examination of the records of land titles; but there always may and ought to be a *certain object* after which suitable enquiries may be made. A mortgage may be given to indemnify a person from damages arising by reason of his having become the surety of another, in the office of sheriff or collector, or as administrator on an estate. In all these cases an enquiring creditor cannot know from the record the precise incumbrance; but he has notice of certain definite facts, which

point to and guide him in the necessary investigation on the subject. Cases of this description must not be confounded with conditions to deeds which neither communicate any certain information nor designate any track, in pursuance of which information may be obtained."

In the transaction of business, the exigencies of it not unfrequently require that the conditions of mortgage deeds should be as uncertain as the one under discussion; and such mortgages are unquestionably legal. Both private justice and the convenience of the public demand that they should be considered valid. The case of mortgages for the indemnity of sureties, has already been mentioned. A mortgage to secure an unliquidated book debt, or the fidelity of a factor or bailiff, whose business it is to receive money and pay it over, undoubtedly would be good; and yet there is nothing certain here but the subject matter of the stipulation.

What, then, is the fatal uncertainty existing in the description of the debt and obligation of Jonathan Pasco? The sum of the indebtedness was not, and could not be, specified; nor was it necessary that it should be; but the subject matter of the mortgage was explicitly stated. The subsequent mortgagee had notice from the record that Jonathan Pasco was indebted; and that he was accountable to the plaintiff for all the monies, and securities for money, of Heath. What the original amount was, the inventory of Heath's estate would inform him; and he would have experienced no difficulty in ascertaining the precise sum and manner of Jonathan Pasco's indebtedness. He was informed, by the mouth of his mortgagor, that a settlement had been made between him and the plaintiff; and that the balance due surmounted twenty-eight hundred dollars. Instead of effectuating the policy of the recording system by an invalidation of the plaintiff's mortgage, the court would, in that event, be instrumental in the perpetration of a hardship most inequitable. The free use and disposal of a person's property, where neither law nor policy forbids, would be inhibited; the exigencies of business, in promotion of the general convenience, disregarded; and the impracticable principle, in all cases, that mortgage conditions must contain within themselves, not reasonable certainty only, but a certainty to a certain intent in every particular, adopted. This would be conformable neither to correct principles nor to our own adjudications.

PETERS, J., was of opinion that this case was not distinguishable in principle from *Pettibone v. Griswold*; and would, therefore, affirm the decree of the superior court.

BRAINARD, J., concurred with the Chief Justice.

BRISTOL, J., said that, aside from the case of *Pettibone v. Griswold*, he should have no doubt that the mortgage in question was

good; but that case had produced some hesitation in his mind; and he was inclined to think that the present case must be governed by it.

Decree reversed.

See same Briefed follows & Cl. T. official

Mtge with Cnd & blw used
ROBINSON v. WILLIAMS. *Recorded. Drft is a*

COURT OF APPEALS OF NEW YORK, 1860.

(22 N. Y. 380.)

*T. Cord where Tm
dictated after advances
by plty but before default*
Appeal from the Superior Court of the city of Buffalo. *Action in re pay-
ment of the* by the receiver of the Hollister Bank, against Williams, the receiver
of the Reciprocity Bank, and other defendants, for the foreclosure
of a mortgage. Prior to September, 1857, both banks were doing
business in the city of Buffalo.

*Mtge binds
as sum a
advance
made. Tha
no certain
sum is
mentioned
is in an
trial. It
is clearly
an Equi. bill
at least &
so good as
a T. Cord.
Further Bk
whom drft
expressed
had notice
sufficient
Further re
Cord wd
be constr.
notice &
present argues
becoming a
B. F. P.*
Upon the trial these facts were proved: On the 24th of Octo-
ber, 1854, the defendants Gibson and wife executed and delivered
a mortgage to the Hollister Bank, which recited that in considera-
tion of the sum of \$1 to them in hand paid, and for the purposes
thereinafter declared and stated, they granted and conveyed to said
bank certain premises therein particularly described. The mort-
gage contained a further recital as follows: "Whereas, it is con-
templated that the said party of the second part will hereafter from
time to time make loans or advances, by way of discount or other-
wise, to the said Charles D. Gibson, upon drafts, bills of exchange,
promissory notes and commercial paper, either made and drawn,
or accepted or indorsed by said Gibson, and it has been agreed
that these presents shall be executed to indemnify and secure the
said party of the second part on account of any such loans, ad-
vances or discounts: Now therefore the condition of these pres-
ents is expressly this: that if the said Charles D. Gibson, his heirs,
&c., shall and do well and truly pay, retire and take up at matur-
ity any and all such drafts, bills of exchange, promissory notes or
commercial paper, as may be discounted or advanced upon by the
said party of the second part, for or to the said Gibson, and shall
well and truly pay at maturity all and every such loans, discounts
or advances, as above recited, and shall well and truly indemnify
pay and save harmless the said party of the second part from and
against all loss, costs, damages, expenses and interests by reason
thereof, then these presents shall cease and be null and void." But
in case of the non-fulfilment of the above conditions, then the
party of the second part was authorized to sell the mortgaged prem-
ises and to make and execute to the purchaser a deed therefor.

Represent the right of authority.

- (1) Auct need not be stated in utge. This true whether of future advances, as here, or of present debt.
- (2) As to all advances made before sub. sequent incumbrance the utge clearly is prior. It is a good utge from moment advance made.
- (3) Court right in holding that clearly good vs cuds as they have no greater rights than utgor, except in states where recording acts ~~that~~ give them greater rights. ~~Also good vs Bk the Bk had notice.~~
- (4) Also good vs Every body here as re. Coded. Cd be as B.F.Ps.
- (5) Wd it be good vs a B.F.P. if no recording acts? Clearly, Yes. No authority as recording acts practically always cover matter.

✓

The mortgage was duly acknowledged on the 25th of October, 1854, and recorded on that day in the clerk's office of Erie County. On the 1st of December, 1855, the defendant Gibson drew his bill of exchange on one Greenleaf, at Boston, whereby he requested said Greenleaf to pay to his own order the sum of \$2500, sixty days from the date thereof; and before said bill became due and payable Gibson indorsed the same to the Hollister Bank, which, on the faith and security of said bill and said mortgage, discounted the same and advanced to said Gibson the amount thereof. This bill was protested at maturity, and no part thereof has ever been paid. On the 29th of December, 1855, Gibson drew another bill of exchange on Greenleaf at sixty days from date, whereby he requested him to pay to his (Gibson's) order, the sum of \$1800.

Before this bill became due, Gibson indorsed it to the Hollister Bank, which discounted it and advanced to him the amount thereof, on the faith of said bill and the mortgage. This bill was also protested at maturity, and no part thereof has been paid.

The complaint set up that the defendant Williams, among others, claimed some interest in the mortgaged premises, and prayed the usual judgment of foreclosure and sale, and that said defendant, and all others claiming interests therein subsequent to that of the Hollister Bank, might be barred and foreclosed. The defendant Williams set up and proved that, on the 29th of January, 1856, the Sackett's Harbor Bank (whose name was subsequently changed, by an act of the legislature, to that of the Reciprocity Bank), recovered a judgment against said Gibson to the amount of \$2798.29; that a transcript thereof was duly docketed in the clerk's office of Erie County on that day; that said Gibson was then the owner of said mortgaged premises; and Williams insisted that said judgment was a lien on said premises, and prior to that of the mortgage. Neither of said bills of exchange were due at the date of the recovery of said judgment. The Superior Court of Buffalo, at special term, gave judgment in favor of the plaintiff, and declared said mortgage to be a prior lien to said judgment. On appeal, the same was affirmed at general term, and from that judgment the defendant Williams appealed to this court.

DAVIES, J. There can be no doubt that, as between the original parties to this mortgage, the validity of it, as a pledge of the mortgaged premises to secure the amount of these two drafts, could not be questioned. It was clearly the intent of the parties that the lands described should stand as security for all advances and discounts made by the Hollister Bank to Gibson. If, therefore, there were no legal mortgage, there was, undeniably, an equitable one, which a court of equity would enforce against the original parties to it, and all others not in the condition of bona fide purchasers or

subsequent incumbrancers without notice. The advances made to Gibson were before the recovery of the Reciprocity Bank's judgment. As soon as the advances were made, they were embraced in and secured by the mortgage. That judgments and mortgages may be taken to secure future advances, though no present indebtedness was subsisting at the time of their execution or rendition, has long been well settled (*Conard v. The Atlantic Ins. Co.*, 1 Peters, 386; *Leeds v. Cameron*, 3 Sumn. 488; *Hubbard v. Savage*, 8 Conn. 215; *Walker v. Snediker*, 1 Hoff. Ch. 145; *Com. Bank v. Cunningham*, 24 Pick. 270; *Monell v. Smith & Jenkins*, 5 Cow. 441; *Lyle v. Ducomb*, 5 Bin. 585; 4 Kent's Com. 175; *Lansing v. Woodworth*, 1 Sand. Ch. 43; *Barry v. Merchants' Ex. Co.*, 1 id. 314; *United States v. Hooe*, 3 Cranch, 73; *Livingston & Tracy v. McInlay*, 16 Johns. 165; *Truscott v. King*, 2 Seld. 147).

In *Conard v. The Atlantic Insurance Company* (*supra*), a mortgage was given to secure a debt upon a *respondentia* bond, and it was said that the debt was of too contingent a nature to uphold a mortgage as collateral security for the payment of it. Story, J., at page 448, says: "We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts as those which already exist and are certain and due."

The case of *Hooe v. United States* (*supra*), is, in some respects, not unlike the present. There, one Fitzgerald conveyed property in trust to W. & J. C. Herbert, to indemnify Hooe for all indorsements or liabilities he might incur on behalf of Fitzgerald; and if Fitzgerald should pay and discharge all such liabilities, the trustees were to reconvey the property to him; but if Hooe should pay any such liabilities on account of Fitzgerald, then, on demand of Hooe, the trustees were to sell the trust property, and pay and satisfy the amount demanded by Hooe. Hooe became liable to pay several notes of Fitzgerald, indorsed by him, and on Fitzgerald's death he was largely in arrear to the United States, and they claimed a preference over all other creditors, under the laws thereof, and that such lien was superior to that created by the trust deed for the benefit of Hooe, and that it was fraudulent as to the United States. It will be observed that, in this case, no sum certain, for which the property was held in trust, was mentioned in the deed. *Marshall*, Ch. J., in delivering the opinion of the court, says (p. 88): "That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent for a person who expects to become more considerably indebted to mortgage property to his creditors as a security for debts to be contracted, as well as that which is already due. All the covenants in

stating ant.



this deed appear to the court to be fair, legitimate, and consistent with common usage."

It is pressed upon us that this mortgage is invalid, because no sum certain is mentioned therein. There might be some force in the argument if the Reciprocity Bank stood in the position of a subsequent purchaser or incumbrancer in good faith, although it will be attempted to be shown that the mortgage would be good as against the bank, even if such were its position. That question will be considered hereafter. The Supreme Court of this State, in the case of *Monell v. Smith*, *supra*, held that a surety, who held a bond and warrant of attorney, conditioned to pay all notes theretofore or thereafter to be indorsed, and to indemnify him against such indorsements, might enter up judgment and issue execution thereon for the sum for which he was actually liable, although the bond was not for a specified sum. That a bond and warrant of attorney might be taken by a surety, to secure him against future liabilities to be incurred by him, the court say, is warranted by the cases cited and considered by the late Chancellor in *Roosevelt v. Mack*, 6 Johns. Ch. 266, 279-285. The court add, "the only question is, whether the same course may be pursued where the bond relates in general terms to liabilities as surety or indorser, past and prospective, without mentioning a sum certain; and we think it may. It is true, the sum does not appear on the face of the bond; and there is no doubt that, in an action on such bond, breaches must be assigned. It would be the same, however, we think, as to a bond conditioned to pay specified sums to third persons. The certainty is the same in both cases. In both, we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain. We all know the objects of the parties to these instruments. It is, to afford the most prompt indemnity."

In *Shiras v. Caig*, 7 Cranch, 34, the subject under consideration seems to have elicited a very full examination; and it was there held, that it was not necessary to the validity of a mortgage that it should truly state the debt it is intended to secure, but it shall stand as a security for the real, equitable claims of the mortgagees, whether they existed at the date of the mortgage or arose afterwards upon the faith of the mortgage, before notice of the defendant's equity. Chief Justice Marshall, in delivering the opinion of the court, at page 50, says: "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made and liabilities to be incurred to an uncertain amount. It is not denied that

stating amt.

a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real, equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation." These principles, and the cases upon which they rest, have lately been emphatically affirmed by the Supreme Court of the United States, in *Lawrence v. Tucker*, 23 How. 14.

I arrive, therefore, to the conclusion, that this is a valid mortgage as between the parties to it, and that the mortgagee was secured thereby the amount of the advances upon the two drafts mentioned in the complaint, although no sum certain was mentioned on the face of the mortgage. These advances were made prior to the recovery of the judgment of the Reciprocity Bank, and prior, therefore, to any equities of that bank. It follows, therefore, they were made prior to any notice to the Hollister Bank of any such equities. No notice could be given of that which had not an existence. It is established then, it is submitted, that, at the date of the recovery of the judgment by the Reciprocity Bank against Gibson, the Hollister Bank had a good legal, and certainly equitable, mortgage upon the premises, to secure the amount of the two drafts already referred to. Was that judgment a prior lien to the mortgage? The judgment became a lien, at the time it was docketed, upon the interest of the defendant therein in all lands in the county of Erie (2 R. S. 359). In equity, the land was undeniably bound to pay off the amount of these two drafts. The law is well settled, that the equitable mortgagee is entitled to a preference over subsequent judgment creditors (*Matter of Howe*, 1 Paige, 129, and the cases there cited; Willard's Eq. Jur., 441, 442; *Rockwell v. Hobby*, 2 Sand. Ch. 9; *Hilliard on Mortg.*, Vol. I., 451). If this mortgage is to be regarded simply as an equitable mortgage, there can be no question that, in accordance with well-settled rules of law and a uniform current of decision, it is a valid security, and is entitled to priority over the subsequent judgment of the Reciprocity Bank.

But, I think, if that bank had been a purchaser on the day of the recovering of its judgment, or an incumbrancer by way of mortgage for money then advanced, the mortgage of the Hollister Bank would equally have been entitled to priority. The recording of the mortgage was notice that the Hollister Bank had a mortgage on the premises for the purposes therein specified. There was enough to

have put a *bona fide* purchaser or incumbrancer upon inquiry; and an application to the Hollister Bank would have disclosed the sum certain for which the security was held. As was said by the Supreme Court in *Monell v. Smith, supra*, "we may be obliged to look beyond the face of the bond to see what is due. In a technical sense, that is certain which may be made certain." The precise sum for which the mortgage was held as security might, at any time, readily and with certainty, have been ascertained, and a *bona fide* purchaser or incumbrancer, with the notice which the record of this mortgage furnished him, if he had omitted to make the inquiry which it indicated, could hardly have claimed to have been a *bona fide* purchaser or incumbrancer. The authorities bearing on this question of notice are fully reviewed in the case of *Williamson v. Brown*, 15 N. Y. 354, and the result of them stated as follows: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser." But we are not without direct authority on the point now under consideration. The case of *Kramer v. The Trustees, &c., of the Farmers' Bank of Steubenville*, 15 Ohio, 253, is of this character. The question there was, originally, whether mortgages given to one Doyle, in May, 1840, were to have priority over those given to one McDowell, which, though dated prior to Doyle's mortgage, were not recorded until 30th September, 1842. The mortgage to Doyle specified no sum in it, but the condition was, "that, whereas the said Alexander Doyle had theretofore indorsed paper of the said Wells, Henry & Co. (the mortgagors), and had also promised to make further indorsements, it was provided that if the said Wells, Henry & Co. should indemnify and save harmless the said Doyle, then the said deed was to be void," &c. Doyle alleged that, relying on this indemnity, he had continued to indorse for the mortgagors, and claimed that his mortgage was a prior lien to that of McDowell and of the judgment creditors. The court sustained Doyle's claim, and directed a sale of the property mortgaged, and that he be paid the amount of his liabilities. Kramer and others, judgment creditors, filed a bill of review, claiming that the court had erred in giving validity and priority to Doyle's mortgage. Among other things, they alleged that Doyle's mortgages were not good and valid as against the complainants, because they were void for uncertainty, and it could not be ascertained how or when the same became forfeited, or how the same could or would be satisfied. In the opinion, at page 260, the court

1/2 all good

say, "Doyle had a right to ask indemnity, and the mortgagors had a right to give it. It was done by way of mortgage; and although these mortgages were intended to cover subsequent as well as previous liabilities, they could not, on this account, be objectionable as between the parties. If, during the existence of these mortgages, a third person had recovered a judgment against the mortgagors, the lien of such judgment might, and probably would, have been preferred to the lien of the mortgagees for liabilities subsequently incurred by Doyle. But these complainants are not in that situation. The liabilities of Doyle had been fixed before the rendition of their judgment. It is not perceived that there would be any difficulty in ascertaining when the condition of the deeds was broken and the mortgage forfeited, nor as to the manner in which they could be satisfied. A similar rule may be deduced from the following cases in Connecticut: *Merrills v. Swift*, 18 Conn. 266; *Lewis v. De Forest*, 20 id. 442; *Ketchum v. Jauncey*, 23 id. 127.

In any aspect in which this case may be regarded, we think it free from doubt, and that the judgment appealed from should be affirmed, with costs.

All the judges concurring,

Judgment affirmed.

Note Oblig secured
here was a present
one.

Mtge with cond below held good as cond. v
YOUNGS v. WILSON. purchaser. Clearly
valid as mtge & if so by
COURT OF APPEALS OF NEW YORK, 1863. being recorded
(27 N. Y. 351.) it is valid vs everyone
as all had taken with co

Appeal from the Supreme Court. Action to foreclose a mortgage. The complaint set forth a bond, executed by Moses W. Eastman to George Youngs and Abel Hunt, bearing date June 4, 1849, in the penal sum of two thousand four hundred dollars, with a condition similar to that of the mortgage next mentioned.

It also set forth a mortgage, bearing the same date and between the same parties, by which Eastman conveyed to Youngs and Hunt certain lands in Yates County, which were particularly described, which conveyance was made subject to the following condition, viz.: "That if the said Moses W. Eastman shall well and truly pay, and save harmless, and indemnify the said George Youngs and Abel Hunt, and each of them, of and from all liabilities which they, or either of them, may have at any time heretofore contracted to and for the said Moses W. Eastman, either as surety, indorsers or guarantors, or otherwise, whether now due or yet to grow due, and shall save harmless the said George Youngs and Abel Hunt, and

Shirley
notices of
That debt
is due to
mortgage
it requires
to state
cont. The
might be
Ev. y. inter
to depa
Creditor?
mtge need
not descend
the debt
accurately
Even tho that
is possible.

Perhaps as strong a case as any expressing
ing the gen'l rule.

- (1) Record of course gives notice. Recording
laws do not require any special cer-
tainty.
- (2) Amt need not be stated. Note \$400\$
mentioned on p. 284 was alleged com-
sid. of utge not debt given to
recr. ~~May be different~~. Whe-
ther utge for present or future
advances amt need not be
stated.
- (3) Description of debt must not be so
false as to be likely to mislead
Subseq. Encumbrancers. to their de-
triment. Cases where debt is
not truthfully stated are cases
where a lump sum is stated
when perhaps future advances,
conting. liabilities, or even something
other than money is secured.
This obviously can never mislead
the ~~Subseq.~~ Subseq. Encumbrancer
as utge is not good for more
than amt stated as vs him.

each of them, of and from all damages, costs and charges on account of the same," then the conveyance was to cease; but in case "default should be made in the payment of all or any part of the said liabilities, as the same should become due," the lands were to be sold and the amount due, with costs and charges, to be deducted from the proceeds, and the surplus, if any, paid to the mortgagor.

The complaint also stated, that the mortgage was duly recorded in the clerk's office of Yates County, on the day of its date; that Youngs had paid debts of Eastman, on which he was liable as surety or indorser, at the time when the mortgage was executed, which amounted to \$724.61 [of which a particular account was given]; and that the estate of Hunt remained liable on a note given by Eastman to one Owens, on the 24th day of December, 1846, for \$263, on which said Hunt was indorser, which, with interest, still remained unpaid; that the mortgaged premises had been conveyed to the defendant, James Miles, who, with the other defendants, claimed some interest in the premises, which interest had accrued subsequent to the lien of the mortgage. There was the usual prayer for a foreclosure, and a sale of the mortgaged premises, and payment of the plaintiffs' demands and costs out of the proceeds.

The usual judgment of foreclosure for the sale of the mortgaged premises, and the payment, out of the proceeds of the sale, of the costs and expenses, and the amounts found due to the several plaintiffs, was entered at a special term; from which judgment Lewis O. Wilson, only, appealed to the Supreme Court at general term. On the hearing of that appeal, the judgment at the special term was reversed, and the complaint dismissed, as against the appellant, with costs, on the ground that the mortgage was fraudulent and void, as against creditors of the mortgagor, for uncertainty in respect to the debt or debts it was intended to secure.

From that judgment the plaintiffs brought the present appeal. After the bringing of such appeal both the appellants died, and the personal representatives of the appellant Youngs were substituted in his place. There had been no substitution as to the executors of Abel Hunt, and it was assumed, on the argument, that as to them the appeal was at an end.

SELDEN, J. I cannot concur with the court below in the opinion that the mortgage in question was void as against creditors or purchasers. There is no pretence, and could be none, that it was not valid between the parties to it. It described the debts which it was intended to secure, with such certainty that there could be no difficulty in determining what debts were, and what were not, embraced in the description. In such cases, the maxim,

That is necessary?

that that is certain which may be made certain, applies. It is not requisite that the condition should be so completely certain as to preclude the necessity of extraneous inquiry (*Monell v. Smith*, 5 Cow. 441; *Robinson v. Williams*, 22 N. Y. 380; *Stoughton v. Pasco*, 5 Conn. 442; *Merrills v. Swift*, 18 *id.* 257; *United States v. Hooe*, 3 Cranch, 73; *Kramer v. The Farmers' and Mechanics' Bank*, 15 Ohio, 253).

If recorded
good is every-
body.

The mortgage having been duly recorded, if not fraudulent in fact, was as effectual against subsequent creditors and purchasers as it was against the mortgagor. If it was sufficiently certain to be valid against the party who made it, it was equally certain and valid against all persons claiming under him. If valid between the parties it was a mortgage, and as it was duly recorded, it was not within the provision of the statute which declares void, as against subsequent purchasers, unrecorded conveyances. The only statute bearing upon the question is the following:

"Every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance *not so recorded* shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded." I can discover nothing in this statute to justify the distinction between certainty as against the party, and certainty as against subsequent creditors or purchasers, which forms the basis of the judgment of the court below. If the instrument was certain enough to amount to a conveyance, it was a recorded conveyance, and valid as such.

A purchaser, with notice of any outstanding equity against his vendor, takes the place of such vendor and acquires his rights only (*Frost v. Beekman*, 1 Johns. Ch. 301; 3 Sugden on "Vendors and Purchasers," 440); and notice of circumstances sufficient to put a party upon inquiry, has the same effect as actual notice of the facts which could be learned on reasonable inquiry (3 Sugden, 468; *Dunham v. Dey*, 15 Johns. 569; *Peters v. Goodrich*, 3 Conn. 150; *Williamson v. Brown*, 15 N. Y. 359). The registry of the mortgage was equivalent to actual notice of its existence and contents, and the purchaser, with such notice, is bound by all the equities which the holder of the mortgage had against the mortgagor, whose place he takes (*Stoughton v. Pasco*, 5 Conn. 442, 447). The condition of the purchaser in the present case is precisely the same as it would have been at common law, if he had purchased with actual notice of the prior mortgage. In that case it cannot be doubted that he would have taken subject to the mortgage, if it was valid against the mortgagor.

.

.

The rule adopted in Connecticut, in *Hart v. Chalker*, 14 Conn. 77, on which the court below placed much reliance, is, that "where a mortgage is given to secure an ascertained debt, the amount of the debt ought to be stated." I am not disposed to question the wisdom of this rule, although it would sometimes be inconvenient and do injustice, and its propriety is not free from doubt (see 5 Conn. 449); but I cannot deduce it from our statute, which merely provides that conveyances not recorded shall be void against purchasers. The mortgage of Eastman was valid between the parties; it was a conveyance, and it was recorded, and therefore was not made void by the statute.

It is only with reference to the question of an actual intention to defraud creditors, that the indefinite description of the debts intended to be secured by the mortgage could be material. What influence such indefiniteness might have in that respect, we are not called upon to determine. There is no allegation in the answer which could raise that question, and if there had been, we could not notice it, in the absence of any finding by the court below upon the question of fact (*Grant v. Morse*, 22 N. Y. 324). I am, therefore, of opinion that the court below erred in declaring the mortgage void, as against Wilson.

Upon the other questions presented by the case, so far as they related to the rights of George Youngs (and to that extent only are they now before the court), I entertain no doubt that they were correctly decided by the special term. The judgment of the general term should, therefore, be reversed, and that of the special term affirmed, as to the relief granted by that judgment to George Youngs.

There are no appellants here representing the estate of Abel Hunt, and the judgment dismissing the complaint as against the executors of that estate, will not be affected by the judgment of this court. The propriety of bringing on the argument of the appeal, without the presence of parties representing that estate, is very questionable, but as neither of the parties before the court interposed any objection on that account, the defect in the proceedings, if it be one, has not been regarded.

MARVIN, J. The judgment of the special term, in favor of the plaintiffs, was reversed by the general term, upon the sole ground that the mortgage was fraudulent and void as to subsequent creditors, on the ground of vagueness and uncertainty in respect to the debts it was intended to secure.

It is conceded that a mortgage given to secure future contingent liabilities may be valid, but the position is, that, in case the debt exists or the liability has been incurred at the time the mortgage is executed, it must be truly stated, so as to enable creditors,

upon examining the record of the mortgage, to ascertain the amount of the debt or the nature and character of the liability assumed.

The validity of the mortgage is not questioned upon the ground that there was, in fact, no valid consideration between the parties to it. In my opinion, the court erred in reversing the judgment. There was a good and sufficient consideration for the mortgage. The consideration expressed was \$2400 money; but this was not the true consideration. It has long and often been held, in this State, that the real consideration of mortgages or deeds may be shown by parol, though different from that expressed in the instrument; and this court, in *McKinster v. Babcock*, 26 N. Y. 378, applied the rule to a chattel mortgage, in which the consideration expressed was money, when, in truth, the real consideration was the indorsement of the note of the mortgagor, and the mortgage was given by way of security. This court sustained the mortgage, the referee having found as a fact that it was executed in good faith, and not with intent to hinder, delay or defraud creditors. So in this case, the parol evidence upon the trial showed what the consideration actually was, and it was sufficient, viz., liabilities assumed by the mortgagee for the mortgagor, and the amount which had been paid of such liabilities. It may be said in this case, as was said in the case just referred to, and also in *Shiras v. Caig*, 7 Cranch, 34, by Chief Justice Marshall, in which the real transaction did not appear on the face of the mortgage, that such cases are liable to suspicion; that they must sustain a rigorous examination, and that it is always advisable fairly and plainly to state the truth. And in this case, I will say that it would have been far better to have specified the liabilities assumed, so that the creditors of the mortgagor or others interested would be able more readily to examine into the facts, and ascertain whether they were true or fictitious. But, if the consideration is actually valid and sufficient, and it is found as a fact, upon sufficient evidence, that the instrument was not executed with intent to hinder, delay or defraud creditors, the court cannot declare the instrument void, as to creditors, upon the ground that the consideration, as expressed, is vague and uncertain. (See *Robinson v. Williams*, 22 N. Y. 380, in which many of the cases are referred to.)

The judgment of the general term should be reversed, and that of the special term affirmed.

—Denio, Ch. J., Davies, Wright, Selden, Emott and Balcom, JJ., concurring,

Judgment accordingly.

~~the mortgagee~~ Mortgagee gets legal title at the time of the mortgage. It is then, however, a bare legal title. He makes an advance. That gives him a beneficial interest in property. T-cred. gets only an equity. The interest since that is all T-debtor has. Then here are two claimants: both have beneficial interests: one has the legal title: this one has gotten both legal title & his beneficial interest w.o. notice. Situation is same as where two Equities & Subseq. gets in legal title w.o. notice: he is protected. Here legal title is not gotten & then subseq. Equity. But since he has legal title & subseq. Equity all w.o. notice he is protected.

But is not docketing of T. notice? No. Records are only notice to Subsequent purchasers or Encumbrancers. Is a very little authority Contra. Clearly wrong.

But suppose mortgagee learns of judgments before making further advance. Then he is in same position as man who, having ~~gotten~~ gotten a Subsequent Equity w.o. notice, gets in legal title with notice. Except where doctrine of tacking prevails such a man is not protected. Such a man is not a B.F.P. So also in our supposed case. He got the legal title w.o. notice but he did not give value until after notice. You must give value w.o. notice to be a B.F.P.

If the advances made after notice are Compulsory then is he protected

See S.C. by 148
Durf. 112

Take case as in
Durf. 112. ~~omit~~
~~Have class read whole case.~~

SEC. III.]

ACKERMAN v. HUNSICKER.

285

ACKERMAN v. HUNSICKER, 85 N. Y. 47 (1881). Action to foreclose a mortgage. Certain of the defendants, who were judgment creditors of the mortgagor, answered, claiming that their judgments were liens superior to the mortgage, as to a portion of the amount claimed by plaintiff to be secured thereby. The mortgage was given to plaintiff to secure him for any indorsements he had made or should thereafter make for the mortgagor to the amount of \$6000. Some of the indorsements were made subsequent to the judgments referred to. In the opinion it is said:

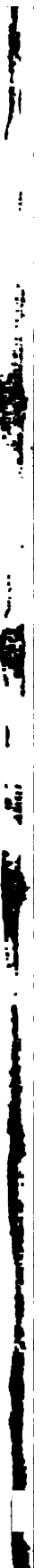
"There is no question as to the validity of mortgages to secure future advances or liabilities. They have become a recognized form of security. Their frequent use has grown out of the necessities of trade, and their convenience in the transactions of business. They enable parties to provide for continuous dealings, the nature or extent of which may not be known or anticipated at the time, and they avoid the expense and inconvenience of executing a new security on each new transaction. It is well known that such mortgages are constantly taken by banks and bankers as security for final balances, and banking facilities are extended and daily credits given in reliance upon them. Mortgages for future advances have sometimes been regarded with jealousy, but their validity is now fully recognized and established (*Bank of Utica v. Finch*, 3 Barb. Ch. 294; *Truscott v. Kings*, 6 N. Y. 147; *Robinson v. Williams*, 22 id. 380; *Shiras v. Caig*, 7 Cranch, 34; *Lawrence v. Tucker*, 23 How. [U. S.] 14; *Leeds v. Cameron*, 3 Sumn. 492)".¹—Per Andrews, J.

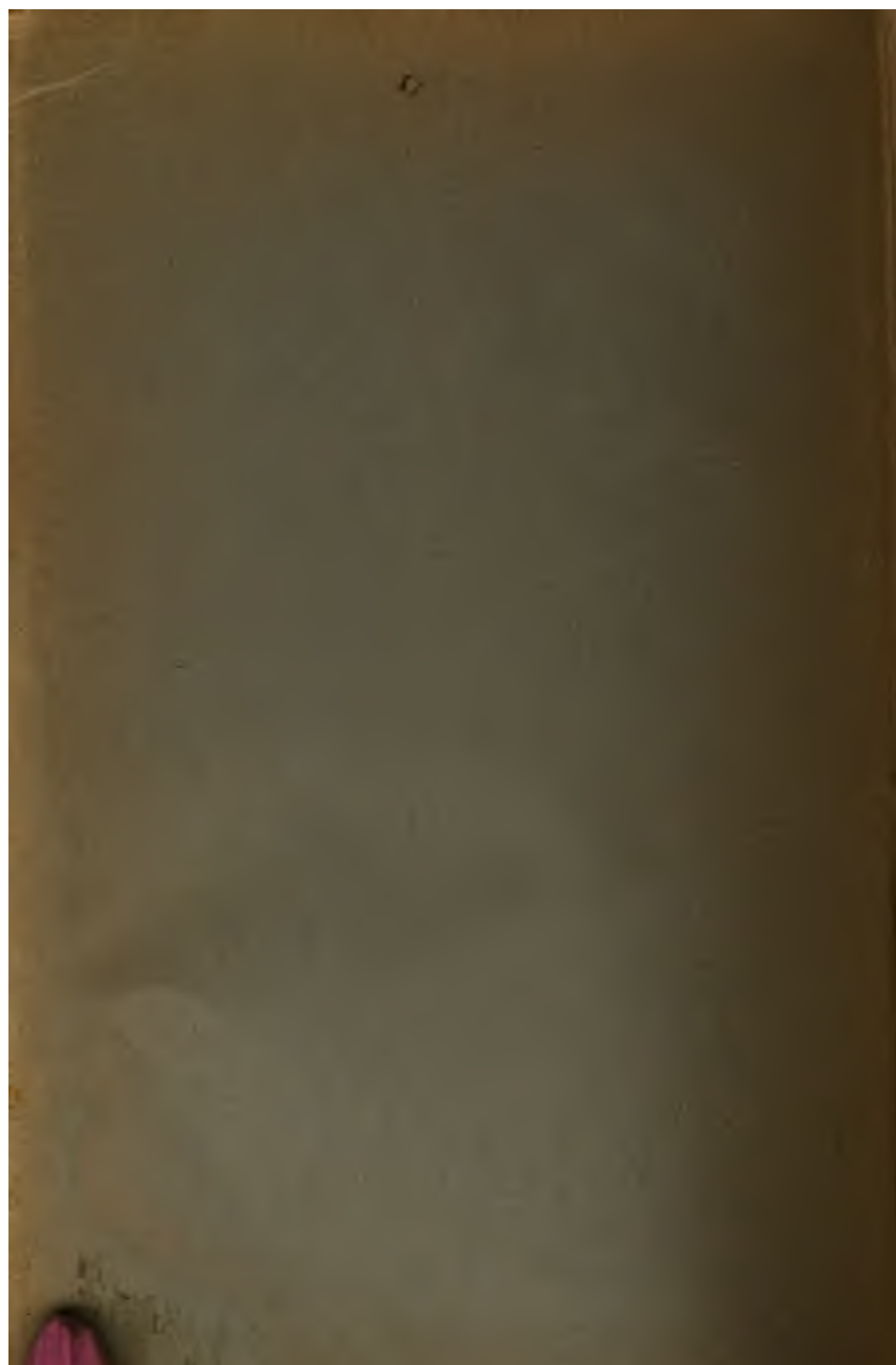
Cases holding
generally
that notice
for future
advances
good.
The cases are numerous: *Commercial Bank v. Cunningham*, 24 Pick. 270 (1837); *Goddard v. Sawyer*, 9 Allen, 78 (1864); *McDaniels v. Colvin*, 16 Vt. 300 (1844); *Collins v. Carlile*, 13 Ill. 254 (1851); *Speer v. Skinner*, 35 Ill. 282 (1864); *Michigan Ins. Co. v. Brown*, 11 Mich. 266 (1863); *Madigan v. Mead*, 31 Minn. 94 (1883); *Freiberg v. Magale*, 70 Tex. 116 (1888).

→ Court held that record was notice to all persons subsequent even tho no advances made when recorded, as a conveyance anyhow; that docketing the judgments was not constructive notice to the utgee as he was a prior encumbrancer; that utgee protects all advances made before the utgee has notice of the subseq. encumbrance. Relied on authorities rather than discussion of principles.

~~the rule is really given at this~~ Is the
right? If one agrees to buy from a trust
w/o. notice of trust and get legal
title w/o. notice of trust & then after
notice pays purchase money he is
not protected. Point is that he is really
not obliged to pay purchase money as
there is a defect in title he has gotten.
Same thing true of ~~party~~ mortgagee who has
bound himself to make advances. HE
can refuse on grd that if he does, now
that he has knowledge of 2nd mortgage, he
will not get the security promised
him. If had a case where mortgagee cd
not refuse on that grd, as where he had
bound himself to a 3rd party, then
he shd be protected in paying after
notice. He becomes a B.F.P. then when
he binds himself to 3rd party.

But might be argued that mortgagee be-
comes a B.F.P. when he binds himself
to mortgagee. It is dif. from trust case.
There purchaser is never bd as when
he buys trustee's title is defective. But
mortgagee is bd to mortgagee - then later the
judgment or 2nd mortgage makes mortgagee's
title defective. But this seems a
rather ^{rather} break distinction, ^{mortgagee's act shd be}
^{statutory} ^{as discharging mortgagee's liability} ^{considered as incorp-}
suppose 1st mortgage & 2nd mortgage are both
for part. advances, & that each knows
of other mortgage & that neither bound
to make advances. Seems then ad-
vances made by either wd rank in
order of time made.





STANFORD UNIVERSITY LAW LIBRARY

DL BKN CVs
Select cases and other authori
Stanford Law Library



3 6105 044 311 483

